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No.

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MICHAEL ROD

In the Supreme Court of the United States

OCTOBER TERM, 1972

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the appellants in the court below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The initial (App. A, *infra*, pp. 1a-22a) and supplemental (App. C, *infra*, pp. 24a-33a) opinions of the court of appeals are not yet reported. The opinion of the district court (App. F, *infra*, pp. 39a-43a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 23a) was entered on February 29, 1972, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on April 27, 1972 (App. D, *infra*, pp. 34a-35a). On July 20, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a routine probationary employee discharge case, the district court may properly order an agency to retain the employee until after she exhausts her remedies with the Civil Service Commission.

STATEMENT

On May 20, 1971, respondent, a probationary employee hired in January 1971 by the General Services Administration at an annual salary in excess of $18,000, received written notice that she was being discharged effective May 29 for her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors" (App. A, *infra*, p. 3a). The notice complied with the applicable Civil Service Commission regulations governing the discharge of federal probationary employees if in fact her discharge was based on conduct occurring dur-

ing the probationary period. See 5 C.F.R. 315.804. Alleging, however, that her discharge was based in part on conduct occurring prior to the probationary period and that she was thus entitled under 5 C.F.R. 315.805 to a more detailed notice and an opportunity to submit a written reply and affidavits, respondent filed an administrative appeal with the Civil Service Commission (App. A, *infra*, p. 3a). See 5 C.F.R. 315.806(c).

While her administrative appeal was pending, respondent brought this action in the district court seeking an injunction against the proposed discharge and a declaration that it was invalid (App. A, *infra*, pp. 3a-4a). She claimed that, in the absence of injunctive relief, she would suffer irreparable injury if discharged pending review of her claim by the Commission. While she acknowledged that the Commission could grant her a lump sum backpay award if it decided her appeal in her favor, she contended that the loss of present wages would make her unable to meet her "payments, mortgages, tuition, etc." (App. A, *infra*, p. 10a).

On May 28, 1971, one day before respondent's scheduled termination of employment, the district court issued a temporary restraining order barring respondent's discharge by the General Services Administration until the motion for a preliminary injunction could be heard (App. E, *infra*, pp. 36a-37a). At the hearing on the motion, the district court determined that a crucial issue in the proceeding was whether the GSA official who made the decision to dis-

charge respondent had based his decision solely on respondent's conduct during her period of probation. Rejecting the government's offer to produce an affidavit from the official, the court stated that it wanted to hear the live testimony of the official so that it could "make up [its] mind as to whether he is telling the truth" (Tr. 9).[1] Accordingly, the earlier stay was continued pending the appearance of the official (App. E, *infra*, p. 38a). The court subsequently issued an opinion concluding that it had jurisdiction "to resolve the question whether the government followed its own regulations" (App. F, *infra*, p. 43a). Pending review of the district court's action, the government has not called the GSA official to testify and the Commission has not processed respondent's appeal.

The court of appeals affirmed the district court's order by a divided vote (App. A, *infra*, pp. 1a-22a). The court noted that the Civil Service Commission has no authority to stay a discharge pending administrative review, although it can award backpay and order reinstatement (App. A, *infra*, pp. 3a, 10a). The court held, however, that the district court has general equity power to grant a preliminary injunction to prevent irreparable injury during the course of administrative proceedings and that this power includes the power to conduct an evidentiary hearing on disputed factual matters (App. A, *infra*, pp. 6a-

[1] "Tr." refers to the transcript of the hearing, reproduced at pp. 40-51 of the appendix filed in the court below. A copy of that appendix has been lodged with the Clerk of this Court.

15a). The dissenting judge stated that the majority's "broad and novel" holding did violence to the statutory scheme governing the dismissal and reinstatement of federal employees (App. A, *infra*, p. 19a).

In denying a petition for rehearing, the court issued a supplemental opinion stating that this case involved "unusual circumstances" and "a very limited principle" (App. C, *infra*, p. 25a). The full court denied the government's suggestion for rehearing *en banc* by a vote of 6 to 3 (App. D, *infra*, p. 35a).

REASONS FOR GRANTING THE WRIT

The decision below represents a novel and unwarranted interference with the authority of the executive to dismiss federal probationary employees summarily, subject only to a very limited post-discharge right of appeal to the Civil Service Commission. See 5 C.F.R. 315.806. For the first time, the court below has authorized district courts to go beyond their limited function of reviewing completed Civil Service Commission determinations and to enjoin discharges pending administrative review. The decision conflicts with decisions of other courts of appeals and is inconsistent with the established administrative scheme for the resolution of federal employee disputes.

1. Under prior decisions of this Court, the federal courts have no general equity jurisdiction to interfere with the summary dismissal of federal employees. See *White* v. *Berry*, 171 U.S. 366, 377-378; *Keim* v. *United States*, 177 U.S. 290, 293-296. Over the years, however, an administrative scheme has been developed for the protection of federal employees.

To protect certain federal employees against arbitrary discharges, Congress, in 1912, enacted the Lloyd-LaFollette Act, 37 Stat. 555 (now codified, as amended, at 5 U.S.C. 7501). That Act provided that no person in the "classified civil service" could be removed except for such cause as would "promote the efficiency of the service" and then only after he had been given notice of, and an opportunity to answer, the charges against him. In Section 14 of the 1944 Veterans' Preference Act, 58 Stat. 390-391, Congress took another step in protecting federal employees by providing for a right of appeal to the Civil Service Commission by a discharged permanent civil service employee entitled to a veteran's preference. This right of appeal to the Commission was extended to most employees in the competitive civil service by Commission regulations (27 Fed. Reg. 4759; now 5 C.F.R. 752.101-752.402) adopted pursuant to Section 14 of Executive Order No. 10988, January 17, 1962, 27 Fed. Reg. 556. The more limited appeal rights of probationary employees are contained in 5 C.F.R. 315.806.

In 1948, Congress amended the basic Lloyd-La-Follette Act of 1912 to provide that any person in the "classified civil service" who is discharged and later restored to the service on the ground that his discharge was unjustified is entitled to backpay for the period he was out of work. 62 Stat. 355. In enacting this backpay statute, Congress recognized the continuing authority of the executive to dismiss a federal employee, and merely provided a means for

compensating the employee in the event his discharge was overturned on appeal. During the debates on the legislation, the manager of the bill in the Senate, Senator Langer, commented that the bill (94 Cong. Rec. 6681)

> * * * provides that an agency or department of the Government *may remove any employee at any time*, but that the employee shall then have a right of appeal. When he is removed, he is of course off the pay roll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended. [Emphasis supplied.]

In 1966, Congress extended the backpay provisions (now codified at 5 U.S.C. 5596) to cover all wrongfully discharged federal employees, including probationary employees. 80 Stat. 94-95. The purpose of the extension, like the purpose of the 1948 provision, was to provide the means whereby all wrongfully discharged employees could be "made whole". S.Rep. No. 1062, 89th Cong., 2d Sess., p. 2; H.Rep. No. 32, 89th Cong., 1st Sess., p. 1.

Thus, a comprehensive administrative scheme has been established, pursuant to statute and Executive Order, for the review of adverse actions taken against federal employees. Congress has chosen not to limit the authority of executive agencies to discharge employees pending administrative review of the adverse actions, but instead enacted the backpay provisions to make them whole in the event they were reinstated. Accordingly, under settled legal principles,

the backpay remedy is exclusive, and the court below erred in holding to the contrary. As this Court has stated in another context, where Congress:

> * * * has enacted a specific statutory scheme for obtaining review * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review to be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411, 422. See also *McKart* v. *United States*, 395 U.S. 185, 193-195; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-768.

2. By involving the district courts in discharge disputes prior to the completion of administrative review proceedings, the decision below conflicts with decisions of other courts of appeals. In *American Federation of Government Employees* v. *Resor*, 442 F. 2d 993 (C.A. 3), certain federal employees sought to enjoin their discharges pursuant to a reduction in force directive. In affirming the district court's refusal to act prior to the exhaustion of remedies before the Civil Service Commission, the court there held (442 F. 2d at 994):

> For the courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question regarding the doctrine of the separation of powers, and in any event would violate a congressional decision that the present controversy be initially considered by the Civil Service Commission.

See also *United States* v. *Professional Air Traffic Controllers Organiztaion*, 438 F. 2d 79 (C.A. 2), certiorari denied, 402 U.S. 915; *Ogden* v. *Department of Transportation*, 430 F. 2d 660 (C.A. 6); *Hills* v. *Eisenhart*, 256 F. 2d 609 (C.A. 9), certiorari denied, 358 U.S. 832. But see *Schwartz* v. *Covington*, 341 F. 2d 537 (C.A. 9).

3. The court below attempted to justify its decision on the ground that it was not interfering with the administrative scheme for reviewing discharge disputes, but was only sanctioning interim relief which the Civil Service Commission was powerless to grant (App. A, *infra*, pp. 6a-7a). Apart from its failure to recognize that Congress intended reinstatement and backpay to be the exclusive form of relief from wrongful discharges, this rationale seriously misjudges the impact of the decision on the administrative process.

Under 5 C.F.R. 315.806, a federal probationary employee may appeal his discharge to the Commission only if he alleges that the discharge was based on discrimination because of race, color, religion, sex or national origin or, as respondent has alleged in this case, that the procedures under 5 C.F.R. 315.805 relating to termination on the basis of conditions arising before employment were not complied with. On such an appeal, the probationary employee may submit evidence by affidavit (5 C.F.R. 772.304(a)), but is not entitled to a hearing.[2] Thus, under the

[2] Permanent employees challenging adverse action are entitled to a hearing before the Commission. See 5 C.F.R. 772.305.

applicable regulations, executive agencies may summarily dismiss probationary employees subject only to limited and summary review by the Commission. We are informed by the Civil Service Commission that in fiscal year 1971, some 4,430 probationary employees were released by the federal government.

Under the decision below, probationary employees may seek review of their discharges in the district courts prior to any action by the Commission by alleging that they will be irreparably injured if discharged pending Commission review, and the district court may hold an evidentiary hearing to determine whether an injunction should issue. In the present case, for example, the district court ordered the government to produce a witness to enable the court to resolve the very issue that is the subject of respondent's appeal to the Commission—*i.e.*, whether her discharge was based on conduct arising prior to her employment. Nor, despite the court of appeals' disclaimer (App. C, *infra*, p. 25a), can it be anticipated that the district courts will become involved only in rare instances. Virtually all discharged federal employees could make allegations similar to respondent's of irreparable injury from loss of wages. Moreover, on the merits, respondent contests her discharge on a relatively routine procedural ground. In short, the decision below threatens to disrupt pervasively the summary procedures for discharging federal probationary employees found unfit for further service.

Nor is the impact of the decision below confined to the discharge of probationary employees. If allowed

to stand, the decision will add a new tier of litigation in all federal personnel cases. The potential volume of new litigation is indicated by the fact that according to Commision figures some 15,590 individual adverse actions and some 21,590 reduction in force actions were taken against federal employees during fiscal year 1971. During the same year, the Commission decided 3,883 appeals at its first level of review. While a substantial number of suits seeking review of completed Commission proceedings are filed in the district court each year, the decision below will encourage employees with administrative appeals pending to seek preliminary relief pending completion of Commission proceedings. At least 12 suits have already been brought in the district court on the basis of the decision below, and the district court has thus far granted relief in two of these cases.[3]

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[3] *American Federation of Government Employees* v. *Fletcher*, D. D.C., No. C.A. 1238-72, (June 30, 1972), writ of mandamus denied (C.A. D.C., No. 72-1615) (reduction in force of 500 NASA employees restrained); *Kirk* v. *Kleindienst*, D. D.C., No. C.A. 1397-72 (July 25, 1972), motion for stay pending appeal or summary reversal denied (C.A. D.C., No. 72-1704, August 16, 1972) (enjoining discharge of non-career supergrade appointee with an annual salary of $34,623). The other ten cases pending before the district court are: *Casarella* v. *Volpe*, C.A. 133-72 (complaint filed prior to court of appeals' decision; plaintiff relied on decision after rendition); *Hasson* v. *Hampton*, C.A. 1231-72; *Hamm* v. *Hoover*, C.A. 649-72; *Hampton* v. *Hubble*, C.A. 873-72; *Sanchez* v. *Richardson*, C.A. 1684-72; *Tarpley* v. *Department of Army*, C.A. 1397-72; *Tarpley* v. *Froehlke*, C.A. 926-72; *Tulbert* v. *Butz*, C.A. 1103-72; *Uehlinger* v. *Seamans*, C.A. 1096-72; and *Williams* v. *Mumford*, C.A. 1633-72.

It is thus apparent that the principle at issue here is of great importance to the administration of the federal civil service and, more fundamentally, to the effective performance of the government's functions and implementation of its programs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1972.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1586

JEANNE M. MURRAY

v.

ROBERT L. KUNZIG,
ADMINISTRATOR, GENERAL SERVICES, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

Decided February 29, 1972

Before ROBINSON, ROBB and WILKEY, *Circuit Judges.*

Opinion for the Court filed by WILKEY, *Circuit Judge*.
Dissenting opinion filed by ROBB, *Circuit Judge*.

WILKEY, *Circuit Judge*: On 20 May 1971 Mrs. Jeanne M. Murray, the appellee, received written notice from one W. H. Sanders, Acting Commissioner, Public Buildings Service, General Services Administration, that her employment with that agency was being terminated effective 29 May 1971. Mrs. Murray had been working as a program analyst for the Public Buildings Service since 5 January 1971, and at the time she received this notice of termination her probationary period of employment in that position had not yet expired.[1]

Under the applicable Federal Regulations, a probationary employee such as Mrs. Murray may be terminated either as a result of (1) conduct during the probationary period, or (2) reasons based in whole or in part on conditions arising before the employment in question.[2] When a probationary employee is terminated for conduct during his probationary period, the agency is simply required to give him written notice of the effective date of his separation and "the agency's conclusions as to the inadequacies of his performance or conduct," but when the termination is based in whole or in part on conditions arising before the employment in question, the employee must be given advance written notice detailing the reasons for the proposed termination, an opportunity to file a written answer to the notice, and an opportunity to furnish affidavits in support of such answer. Further, the agency is required

[1] For the statutory authority for such probationary periods, see 5 U.S.C. (Supp. V) 3321, Public Law 89-554, 80 Stat. 422 (1966).

[2] The applicable regulations are to be found at 5 C.F.R. §§ 315.801—315.807 (1970 Edition). Section 315.804 refers to termination for conduct during the probationary period, and § 315.805 covers termination for conditions arising before appointment.

to take such answer and affidavits into account in reaching its final decision on termination.

Probationary employees are given the right to appeal terminations to the Civil Service Commission when the employee alleges that the termination has not complied with the applicable federal law and regulations.[3]

The termination notice that Mrs. Murray received on 20 May 1971 was in the form required for a termination based on conduct during the probationary period, and gave as the reason that she had "shown complete unwillingness to follow office procedure and to accept direction from [her] supervisors."[4] Shortly before the effective date of termination Mrs. Murray's attorneys contacted a personnel official at GSA and suggested (on the basis of information that they had acquired through investigation) that her termination may have been based on conduct which occurred prior to her GSA employment, and the lawyers reminded the official that in that event Mrs. Murray would be entitled to additional procedural rights, which she had so far not been offered. After Mrs. Murray's counsel was informed by the GSA that she would not be afforded these additional procedures, Mrs. Murray filed a timely appeal of her discharge, alleging that the discharge was invalid because, *inter alia*, it was based in part on conduct occurring prior to her employment with the GSA, and she should have been afforded the additional rights appurtenant to such a discharge.

It is important to note that the Civil Service Commission has no power to order a stay of such a discharge. Confronted with this situation, Mrs. Murray brought this action in the District Court seeking a declaration that her

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[3] 5 C.F.R. § 315.806.

[4] The notice is marked as Exhibit A in the record before us.

discharge was invalid, and an injunction restraining her termination. With her complaint she filed a motion for a temporary restraining order (T.R.O.), which was issued on 28 May 1971, prohibiting the GSA from terminating her employment "until the determination of plaintiff's application for an injunction and other relief."[5] On 3 June 1971 Mrs. Murray filed a motion for a preliminary injunction, and on that same day Government counsel filed a motion to dismiss. On 4 June 1971 the District Court held a hearing on the motion for a preliminary injunction.

At that hearing the Government counsel argued that the District Court lacked jurisdiction to enjoin the termination (or any other jurisdiction in the matter) until Mrs. Murray had exhausted her remedies before the Civil Service Commission. Mrs. Murray's counsel drew a distinction between the type of interlocutory relief that she was seeking on her motion (which relief was requested only until the Civil Service Commission had acted on her appeal), and an actual adjudication on the merits of the contention that her discharge was improper.[6] The District Court determined that a crucial issue in the proceeding was the veracity of the assertion that Mr. Sanders, who apparently made the decision on termination, had based his decision only on her conduct during her probationary period.[7] Government counsel offered to produce Mr. Sanders' affidavit to that effect, but Judge Gasch concluded that he wanted to hear Mr. Sanders in person, and that the stay would be continued until Mr. Sanders appeared to testify.[8]

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[5] Appendix, pp. 34-35.

[6] See *Transcript of Proceedings*, Civil Action No. 1053-71, 4 June 1971, at 4-6, hereafter "Tr."

[7] Tr. 2-3, 7-8.

[8] Tr. 3, 8-11.

Thus a new stay was issued on 4 June 1971, continuing the T.R.O. of 28 May 1971, "pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, . . . because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim. . . ."[9]

By the terms of the two stays it was apparent that they would no longer be in effect after a "final hearing on the merits by the Civil Service Commission,"[10] but in order to avoid mooting the issue of the legality of the stays and the District Court's insistence on hearing Mr. Sanders, the Civil Service Commission has not passed on Mrs. Murray's appeal, and will not until after the case at bar has been decided by this Court. The stay of 4 June 1971 is still in effect, the Government has declined to produce Mr. Sanders to testify, and we are informed that Mrs. Murray is still working at the Public Buildings Service.

On this appeal the Government challenges the validity of the stays by urging that (1) the District Court lacked jurisdiction to enjoin the discharge of a probationary employee whose appeal challenging the discharge was pending before the Civil Service Commission, and (2) that the District Court improperly restrained the discharge of a probationary employee until the acting head of the agency in which the employee worked presented testimony in the District Court concerning the reasons for the discharge. We find both of the Government's contentions to be without merit, and we thus affirm the order of the District Court.

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[9] Appendix, p. 38.

[10] Appendix, p. 34.

I. *The District Court's Jurisdiction to Enjoin the Discharge*

It is important to specify exactly what legal issue confronts us. We are here concerned with the propriety of the court's granting interim injunctive relief pending an administrative determination on the merits, when there is no statutory provision specifically authorizing such relief.[11] In the past this issue has been confused with the related, but quite distinct, issue of the necessity for the exhaustion of administrative remedies before an adjudication on the merits may be obtained in a court.[12] This error

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[11] On this precise legal question see generally Comment, *Interim Injunctive Relief Pending Administrative Determination*, 49 Col. L. Rev. 1124 (1949); and L. Jaffe, *Judicial Control of Administrative Action*, pp. 666-686, 687-708 (1965).

[12] Comment, *supra* note 11, at 1127-1128; Jaffe, *supra* note 11, at 669-671.

In addition to the view that this is a situation where the exhaustion of remedies doctrine does not apply, it is possible to regard the case at bar as one in which the administrative remedies available to the appellee have indeed been exhausted. What was sought here was the interim relief of a stay to prevent Mrs. Murray's discharge. The Civil Service Commission, to whom the appeal of the discharge was made, has no authority to grant such a stay. There is thus no administrative body to look to for the interim relief which was sought. As there was no administrative remedy available to her, it can be said that as far as the question of interim relief is concerned, Mrs. Murray had exhausted her administrative remedies. It was thus proper for her to seek such relief from this court.

For this reason, and for the reason just given in the text that we believe this issue of interim injunctive relief is quite distinct from the question of exhaustion of administrative remedies, we disagree with the conclusion of the dissent here that "the exhaustion of administrative remedies doctrine is fully applicable to cases in which temporary injunc-

stems from the failure to recognize that what is sought in actions such as the case at bar is not a determination on the merits that will be binding upon the administrative agency before that agency has had its chance to complete its procedures for such a determination, but is simply an interim form of relief to prevent irreparable damage to the parties or to the public interest while the final outcome of the administrative determination is uncertain. Such interim relief is not the interference with agency actions which the exhaustion of remedies doctrine seeks to prevent, but instead often serves as an aid to the administrative process, since by preserving the *status quo* it ensures that the final administrative determination will not be undermined or rendered ineffective by hasty or incorrect procedures at an earlier stage."

This error, this confusion of the two distinct issues of exhaustion of remedies and granting of interim relief, has apparently been made by the Government here. Thus, the cases on which the Government principally relies for its contention that the enjoining of the discharge was im-

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tive relief is sought . . . ." See Comment, *supra*, note 11; Jaffe, *supra*, note 11.

[13] This is by no means the first time that we have recognized such a power to grant interim relief. When the doctrine of exhaustion of remedies requires the pursuit of another remedy before an agency, if that agency cannot grant interim relief, the court may properly grant a preliminary injunction to preserve the status quo while the administrative remedy is being exhausted, though it may not grant a permanent injunction until after the administrative remedy is exhausted. See *Brawner Building* v. *Shehn*, —— U.S. App. D.C. ——, ——, 442 F.2d 847, 855 (1971); *Wheelabrator Corp.* v. *Chafee*, —— U.S. App. D.C. ——, ——, —— F.2d ——, —— (No. 24,705, issued 14 October 1971, slip op., at 19-21); and see also *Steinthal* v. *Seamans*, —— U.S. App. D.C. ——, ——, —— F.2d ——, —— (No. 24,595, Decided 14 October 1971, Slip op., at 31).

proper are all cases which deal with the impropriety of a court's rendering a finding on the merits before administrative remedies have been exhausted.[14] None of these four cases addresses the problem of the propriety of injunctive relief to stay a discharge which is not yet effective at the time the relief is sought from the courts. Furthermore, other cases cited by the Government recognize that in some situations interlocutory relief, such as is sought here, may be granted, although the particular facts of those cases did not call for such relief.[15]

Having thus spelled out the precise legal issue with which we are concerned, and the Government's confusion with respect to it, we now determine whether in this instance the District Court had jurisdiction to grant the interim relief sought.

Perhaps the best guidance is provided by the opinion of Justice Frankfurter, speaking for the Court in *Scripps-Howard Radio* v. *FCC* (1942).[16] That case arose on certificate from this court, and held that even where there was no specific statutory grant of authority, this court had the power to stay the execution of an order of the Federal Communications Commission from which an appeal had been taken, pending the determination of the appeal. While the appeal in *Scripps-Howard* was to this

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[14] See *Green* v. *Baugman*, 94 U.S. App. D.C. 291, 214 F.2d 878 (1954), *Young* v. *Higley*, 95 U.S. App. D.C. 122, 220 F.2d 487 (1955), *Lodge 1858, American Federation of Government Employees* v. *Paine*, 141 U.S. App. D.C. 152, 436 F.2d 882 (1970), and *Johnson* v. *Nelson*, 86 U.S. App. D.C. 98, 180 F.2d 386 (1950), *cert. denied* 339 U.S. 957 (1950).

[15] See *American Federation of Government Employees, Local 1904, Local 1498* v. *Resor*, 442 F.2d 993 (3rd Cir., 1971); *United States* v. *Professional Air Traffic Controllers Organization*, 438 F.2d 79 (2nd Cir., 1970); *Ogden* v. *Department of Transportation*, 430 F.2d 660 (6th Cir., 1970).

[16] 316 U.S. 4.

court, and the appeal in the case at bar is to another organ of the agency, we think that the Court's reasoning still applies:

> No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.[17]

Recently, in *FTC* v. *Dean Foods Co.* (1966),[18] the Supreme Court again alluded to this power to grant a stay, this time at the request of an agency, pending its own final determination:

> [D]ecisions of this Court 'have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . . Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action.'[19]

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[17] 316 U.S., at 9-10. The principal authority for this holding was the All Writs Act, § 262 of the Judicial Code, then 28 U.S.C. § 377, which empowered the federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 316 U.S., at 10n. This provision is now to be found at 28 U.S.C. § 1651(a), and reads "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[18] 384 U.S. 597.

[19] 384 U.S., at 604. The portion in inner quotations is taken

The power to issue such relief is necessary because of the possibility of irreparable harm, but as the Court made clear in *Scripps-Howard Radio, supra*, the exercise of the power is discretionary:

> If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. [But] . . . '[a] stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. [Citation omitted.] It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case.' [Citations omitted.] [20]

Thus, before such relief may be granted, it must be shown that there is a possibility of irreparable harm without it. Mrs. Murray has urged that if relief is denied she may suffer such irreparable harm, even if she were eventually to prevail on the merits of her appeal to the Civil Service Commission and be granted a lump-sum award, since because of an absence of present wages she may be unable to meet her ongoing financial commitments such as "payments, mortgages, tuition, etc." [21] (We might

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from *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671, n.22 (1963). "There the Court cited such authority as *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U.S. 4 (1942); *West India Fruit & S.S. Co.* v. *Seatrain Lines, Inc.* 170 F.2d 775 (C.A. 2d Cir. 1948); and *Board of Governors* v. *Transamerica Corp.*, 184 F.2d 311 (C.A. 9th Cir.), *cert. denied*, 340 U.S. 883 (1950)." 384 U.S., at 604.

[20] 316 U.S., at 10-11.

[21] Brief for Appellee, at 8-9.

The assertion of the dissent that "The majority attempts to justify its decision by finding that unless interim relief is granted, Mrs. Murray may suffer irreparable harm from a temporary loss of wages" is an erroneous conception of the

also mention the humiliation, scorn, and other emotional factors which might attend an unwarranted discharge, and which an award of money may hardly rectify.) Without passing on the merits of Mrs. Murray's contention that she will suffer irreparable harm if the sought-for-relief is not granted (a task for the District Court here), we note that there was a determination that such a loss of employment could be "irreparable harm" in *Reeber* v. *Rossell*, (1950),[22] a case quite similar to that at bar. We agree with the *Reeber* court that such a loss of employment *can* amount to irreparable harm, and that injunctive relief *may* be a proper remedy pending the final administrative determination of the validity of the discharge by

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majority's position. We cannot, of course, make any such finding, as that is for the trial judge, who has not yet (and may never) decide this point in favor of Mrs. Murray. See *infra*, Part III. We agree with the position taken by the dissent that a remedy for "temporary loss of wages" has been provided by Congress in the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970). In most cases this may prove to be a complete safeguard for a discharged (or soon to be discharged) federal employee, and consequently judicial intervention to grant a stay would be unwarranted for the reasons given in the dissent of Judge Robb. Nevertheless, there are occasionally exceptional cases where the remedy of back pay or reinstatement will not be enough, and an exercise of the court's equity powers to grant interim relief may be called for. See *Covington* v. *Schwartz*, 341 F.2d 537 (9th Cir. 1965). Congress presumably could remove the jurisdiction of the District Courts to grant such equitable interim relief, in light of the remedies available, such as the Back Pay Act, but so far it has not seen fit explicitly to do so. Until the day that it does, we are unwilling to rule that the District Courts may not continue to perform their historical role and grant equitable relief in the exceptional cases which may arise in this area. See *infra*, note 34 and accompanying text.

[22] 91 F. Supp. 108 (S.D.N.Y., Kaufman, J.). See also *Covington* v. *Schwartz*, 341 F.2d 537 (9th Cir. 1965).

the Civil Service Commission. Since this relief may be proper in the form of an injunction, it follows that a T.R.O. which is issued to preserve the *status quo* pending a hearing on the injunctive relief, as we have in this case, is also proper.

We do not think that there is any distinction to be made here between "temporary" or "permanent" federal employees, since a temporary employee certainly may be just as irreparably damaged by a termination that is not in accord with agency regulations. The issue in each instance is the same: has the agency accorded procedural due process under its own regulations? Thus, it is within the court's discretion to grant interlocutory relief in a case of either type of employment, provided that the necessary conditions for an exercise of that discretion are present. We now move on to enumerate those conditions.

The landmark decision in our Circuit on the factors which influence the decision here on whether to grant extraordinary relief is *Virginia Petroleum Jobbers Ass'n* v. *FPC* (1958).[23] Judges Miller, Bazelon, and Burger, in a *per curiam* opinion, held that four questions must be asked: (1) Has the petitioner made a strong showing that he is likely to prevail on the merits on his appeal? (2) Has the petitioner shown that without such relief he will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?[24] This four-question formula must be applied by the trial courts in deciding whether to grant a stay, and the formula has been widely referred to.[25] The first of these four ques-

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[23] 104 U.S. App. D.C. 106, 259 F.2d 921.

[24] These four tests are discussed at 104 U.S. App. D.C., at 110, and 259 F.2d, at 925.

[25] Jaffe, *supra* note 11, at 689.

tions, "Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal?", is of particular interest to us here, since it is the question which has resulted in the second issue in this appeal, and it is to this issue which we now turn.

II. *The District Court's Power to Continue Its Order Until Mr. Sanders Appears to Testify*

One of Mrs. Murray's chief contentions in her appeal to the Civil Service Commission is that her termination was based at least in part on events which took place prior to her employment with the GSA.[28] If Mrs. Murray is correct, she will prevail in her appeal to the Commission, because admittedly the agency did not accord her the hearing and other procedural due process called for by its own regulations. Thus the accuracy of this contention is important for the District Court here in answering the first of the four questions to determine whether a stay should be granted, "Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal?"

While it is not explicit from the record that the District Court was seeking to determine the veracity of this allegation of Mrs. Murray's as part of the four-question formula for determining the propriety of a stay, we think that this may be implied, and knowing that the District Court is thoroughly familiar with *Petroleum Jobbers*, this is what it must eventually come to. It is clear that it was this question, whether the termination was based on events which took place before Mrs. Murray's temporary employment, which led the Court to continue the stay until Mr. Sanders was produced to testify. As mentioned earlier, at the hearing on the motion for a preliminary injunction of 4 June 1971 the Government counsel offered

[28] See text following note 4, *supra*.

to produce an affidavit signed by Mr. Sanders to the effect that he had based Mrs. Murray's termination *only* on her conduct during her probationary period, but the court decided that it could better judge the veracity of this assertion if Mr. Sanders were to appear in person.[37]

We think that this issue is resolved by the text of Rule 43(e) of the Federal Rules of Civil Procedure, which provides that:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, *but the court may direct that the matter be heard wholly or partly on oral testimony* or depositions. [Emphasis supplied.]

We read this rule as giving the trial court discretion to choose between hearing oral testimony or taking affidavits in making the factual judgments necessary to the granting or denial of the motion in question. We think that this must mean that the trial judge may decline to accept affidavits that are offered, and insist on oral testimony, for reasons which we shall elaborate below. Finally, since Government counsel was aware of Rule 43(e), counsel knew that an offer to present testimony by affidavit might result in the Government being required to produce oral testimony instead. We do not here reach the issue of whether the trial judge could have continued his stay even if the Government had not offered Mr. Sanders' testimony by affidavit, but we do hold that when the Government, as it did here, offers to produce testimony by affidavit, because of Rule 43(e) it cannot decline to produce the affiant for oral examination.

We make this holding because of the purposes that lie behind Rule 43(e), and their applicability in this context. As we recently observed, "the decision of factual issues on a motion for a preliminary injunction simply by consid-

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[37] Note 8, *supra*, and accompanying text.

eration of conflicting affidavits is widely disapproved."[28] The far better procedure when motions are more than routine is to take oral testimony as to disputed matters of fact.[29] This is because of the better opportunity that oral testimony gives the trier of fact to determine credibility. Affidavits deprive him of the opportunity to judge demeanor, and the opportunity to observe "the chastening process of cross-examination."[30] "Without these twin tools, normal in the trial of factual issues, the factual conclusion [is] certain to take on an unaccustomed quality of artificiality."[31]

III. *The Scope of Our Holding Here*

As a last matter we consider, albeit briefly, the Government's contention raised vigorously in oral argument that to affirm the order of the trial court would be to interfere unduly with the hiring and firing of Government employees. To this contention we need only make three observations.

First, we see our function here as no more than breathing life into the regulations of the Government agencies themselves, which regulations formed the basis for the order sought in this case. Both this court and the trial court are doing nothing more than attempting to give force to those regulations.

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[28] *Autera* v. *Robinson*, 136 U.S. App. D.C. 216, 221n, 419 F.2d 1197, 1202n (1969).

[29] See *Autera*, *supra* note 28; *Industrial Electronic Corporation* v. *Cline*, 330 F.2d 480 (3rd Cir., 1964); *Securities and Exchange Commission* v. *Frank*, 388 F.2d 486 (2nd Cir. 1968).

[30] The quoted phrase is Judge Robinson's, from *Autera*, *supra*, 136 U.S. App. D.C., at 221, 419 F.2d, at 1202.

[31] Ibid.

Second, by far the greater interference with the "hiring and firing" of Government employees was caused by the Government's own decision to hold in abeyance Mrs. Murray's appeal to the Civil Service Commission, and thus keep Mrs. Murray in her position of temporary employment to avoid mooting the appeal to this court. The District Court's stay was to terminate upon the determination of Mrs. Murray's appeal to the Civil Service Commission, and had it not been for the conscious decision of the Government to postpone that determination, the stay would have been lifted some time ago. We are thus unpersuaded that here we are presented with an occasion where the Judiciary has interfered unduly with the day-to-day activities of the Executive Branch.

Third, and most important, we consider the scope of the opposite holding the Government seeks to have us make here. Judge Gasch has not yet ruled that the discharge of Mrs. Murray from her probationary employment should be enjoined; he may never do so. Without intimating in any manner which way this case should be decided, it is probable that only in a small percentage of cases would the complaining employee be able to establish the grounds for a temporary injunction—assuming that executive agencies conscientiously follow their own rules of due process. But here the complaining employee alleges that the agency has violated its own rules, has not accorded her the required hearing, and is in the process of discharging her unlawfully. She does not ask the trial court to rule on the *merits* of her discharge; the agency may have ample grounds, but it must follow procedural due process to establish them. To hold that the District Court has no jurisdiction on the basis of these allegations to grant the temporary relief requested, would be tantamount to holding that the District Court *never* would have jurisdiction.

This is really what the Government seeks here, a declaration of no jurisdiction in the District Court to grant

temporary relief under any circumstance, on the ground that to do so at any time would interfere with the Executive Branch's right to "hire and fire." It is asserted that the Civil Service Commission has been given exclusive review jurisdiction.[32] But, as noted initially, there is no statutory power in the Civil Service Commission to grant a temporary stay of discharge. Prior to the Civil Service Act[33] a United States District Court would certainly have had jurisdiction and power to grant such temporary relief. The statute did not explicitly take it away, nor implicitly by conferring such jurisdiction and power on the CSC; we hold the District Court still has jurisdiction and may exercise the power under established standards in appropriate circumstances.[34]

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[32] Brief for the Government, at 11-12.

[33] Act of Jan. 16, 1883, ch.27, 22 Stat. 403 (See Title 5, U.S.C. §§ 1101-1105, 1301-1303, 1307, 1308, 2102, 2951, 3302-3306, 3318, 3321, 3361, 5706, 7152, 7153, 7321, 7322, 7352; See Title 18, §§ 1, 371, 1917; Title 40, § 42); Act of July 26, 1937, ch. 522, 50 Stat. 533 (See Title 5, § 7152); Act of June 10, 1948, ch. 434, 62 Stat. 351 (See Title 5, § 7153).

[34] The Communications Act of 1934 was likewise silent as to interim relief by the FCC or the courts. In *Scripps-Howard Radio, Inc.* v. *F.C.C.*, *supra* note 16, the Supreme Court held:

> The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxillary powers to the federal courts. The Commission argues that the silence of Congress, in view of the legislative history of the Act and the nature of the orders reviewable under the Act, qualifies this general authority and is as commanding as if Congress had expresly

As the District Court here felt that the hearing on the motion for the preliminary injunction could not be completed until Mr. Sanders was produced to testify, it was proper for him to continue the stay, in order to preserve the *status quo* pending the completion of the hearing.

The order of the District Court is

Affirmed.

ROBB, *Circuit Judge, dissenting*: The majority concedes that Mrs. Murray did not exhaust her administrative remedies under the Civil Service Commission regulations (*See* 5 C.F.R. §§ 315.801—315.807 (1971)) before seeking injunctive relief in the district court. The majority opinion also recognizes the established doctrine that a court may not intervene with a decision on the merits before administrative remedies have been exhausted. *See, e.g., Young v. Higley*, 95 U.S. App. D.C. 122, 220 F.2d 487 (1955); *Green v. Baughman*, 94 U.S. App. D.C. 291, 214 F.2d 878 (1954); *Johnson v. Nelson*, 86 U.S. App. D.C. 98, 180 F.2d 336, *cert. denied*, 339 U.S. 957 (1950). The majority concludes, however, that this doctrine does not apply to a re-

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withheld from the Court of Appeals the power to stay orders appealed under § 402(b).

The legislative history can furnish no support for this contention. . . .

We conclude that Congress by § 402(b) of the Communications Act of 1934 has not deprived the Court of Appeals of the power to stay—a power as old as the judicial system of the nation. We do not of course go beyond the question put to us. We merely recognize the existence of the power to grant a stay. We are not concerned here with the criteria which should govern the Court in exercising that power. Nor do we in any way imply that a stay would or would not be warranted upon the showing made by the appellant in this case.

316 U.S., at 11, 17.

quest for "injunctive relief to stay a discharge which is not yet effective at the time the relief is sought from the courts". Such injunctive relief, says the majority, "is simply an interim form of relief to prevent irreparable damage to the parties or to the public interest while the final outcome of the administrative determination is uncertain" and "is not the interference with agency actions which the exhaustion of remedies doctrine seeks to prevent * * *". (Opinion, p. 7.) I cannot accept this theory. In my judgment the exclusion of applications for interim judicial relief from the reach of the exhaustion of remedies rule is an unwarranted and unfortunate breach of the rule that will result in improper interference by the courts in the administration of the civil service system.

The application of the exhaustion of remedies doctrine is not limited to situations in which judicial relief on the merits is sought. *See, e.g., Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 778-80 (1947); *Osmond v. Riverdale Manor, Inc.*, 199 F.2d 75 (4th Cir. 1952); *Johnson v. Postmaster General*, 330 F. Supp. 1058 (D. Md. 1971); K. Davis, Administrative Law Treatise pt. 3, § 20.05 at 90-91 (1958). The interests served by the exhaustion doctrine are broader than those suggested by the majority, and include such other considerations as the integrity and independence of the established administrative process and the recognition of congressional intent as reflected in statutory procedures which balance public and private interests. The decision of the majority does violence to those fundamental interests upon which the exhaustion doctrine is based.

The cases cited by the majority do not justify their broad and novel holding. The issues and facts in those cases were quite different from the issues and facts presented in the case at bar, and the language quoted by the majority must be read with this in mind. Thus, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), merely

sustained the "conventional power" of this court to stay the enforcement of a final order of the FCC pending the determination of an appeal challenging its validity. *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), held only that at the instance of the Federal Trade Commission a circuit court of appeals, under the All Writs Act, 28 U.S.C. § 1651 (a), might enjoin a merger on the ground that "an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile" (384 U.S. at 605). In other words, the Court held that injunctive relief was necessary to prevent the impairment of the effective exercise of appellate jurisdiction. Again, in *West India Fruit & Steamship Co. v. Seatrain Lines, Inc.*, 170 F.2d 775 (2d Cir. 1948), the Maritime Commission joined with a private party in requesting the court to enjoin rate reductions that were alleged to be unlawful. In granting the injunction the court carefully recited the extraordinary circumstances which warranted such relief. That case does not support the broad exception to the exhaustion of remedies rule expounded by the majority. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE pt. 3, § 20.05, at 90-91 n. 46 (1958).

The majority attempts to justify its decision by finding that unless interim relief is granted, Mrs. Murray may suffer irreparable harm from a temporary loss of wages. The flaw in this argument is that Congress by the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970) (*See* 5 C.F.R. § 550.801), has expressly provided that administrative review by the Civil Service Commission shall not inflict irreparable harm upon an employee who is found to have "undergone an unjustified or unwarranted personnel action". The Act insures that Mrs. Murray's appeal to the Civil Service Commission can give her substantial and effective relief by way of reinstatement and reimbursement for pay lost, if she was improperly dismissed. There is

therefore no need here for injunctive relief to avoid "rendering the enforcement of any final decree * * * futile".

The opinion of the district court in *Reeber v. Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950), upon which the majority relies, assumes that reinstatement with back pay could not have been awarded to the plaintiffs if they were successful.[1] (*See* 91 F. Supp. at 113.) In light of the Back Pay Act of 1966, which now makes such relief available, the reasoning of this 1950 decision is not persuasive.

The legislative and administrative scheme embodied in the Back Pay Act and the Commission's regulations leads me to the conclusion that this case does not call for equitable relief prior to the exhaustion of all administrative remedies. Congress has enacted a statutory scheme to govern the dismissal and reinstatement of federal employees and has thereby struck a balance between the government's right to hire and fire and the rights of individual employees. A court should not upset that balance by interfering before the administrative remedies provided by the statutory plan have been exhausted. Certainly a court should not substitute its judgment on the equities or the public interest for the judgment of Congress. This is particularly true here, where the injury to Mrs. Murray is no greater than that which would ordinarily flow from dismissal. My conclusion is reinforced by the statement of Senator Langer, manager of the 1948 back pay bill[2] in the Senate:

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[1] The *Reeber* case involved employee claims under the Veterans' Preference Act which arose out of demotions and dismissals pursuant to a reduction in force in the Veterans' Administration. On these facts, Judge Kaufman's view that back pay and reinstatement would not be available to the plaintiffs was most likely correct. *See* 62 Stat. 354 (1948); 39 COMP. GEN. 639 (March 14, 1960).

[2] The 1948 Act, 62 Stat. 354, was the predecessor to the

> MR. LANGER. Mr. President, the [conference report on the back pay bill] represents a full and complete agreement, and provides that an agency or department of the Government may remove an employee at any time, but that the employee shall then have a right of appeal. *When he is removed, he is of course off the pay roll.* If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended. 94 CONG. REC. 6681 (1948) (emphasis supplied).

In short, the exhaustion of administrative remedies doctrine is fully applicable to cases in which temporary injunctive relief is sought, and I perceive no occasion for making an exception to its application in this case. "The very fact that Congress has [established a prescribed procedure] must be cast into the scales as against the factors which, without that fact, would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. • • • In short, the so-called general principles governing the exercise of jurisdiction in equity are not to be taken, in such a case, as isolated from all effect of the legislative mandate or necessarily or even readily overriding it." *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 775 (1947). To uphold the district court's action, in my view, is to short-circuit civil service procedures by over-extending the long arm of equity.

I respectfully dissent.

Back Pay Act of 1966, 5 U.S.C. § 5596. The 1966 Act was intended only to fill certain gaps in the protection afforded by the earlier back pay provisions. *See, e.g.*, note 1 *supra*. The legislative purpose behind both the 1948 and 1966 provisions was identical. *See* S. REP. NO. 1062 (March 10, 1966), in 1966 U.S. Code Cong. & Admin. News 2097-98. Senator Langer's remarks related to the conference report on the 1948 amendment, 62 Stat. 354 (1948), to section 6 of the Act of August 24, 1912, 5 U.S.C. § 652 (1946).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

Civil Action 1053-71

No. 71-1586

JEANNE M. MURRAY

v.

ROBERT L. KUNZIG, ADMINISTRATOR,
GENERAL SERVICES, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

Before: ROBINSON, ROBB and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court:

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

Dated: February 29, 1972.

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1586

JEANNE M. MURRAY

v.

ROBERT L. KUNZIG,
ADMINISTRATOR, GENERAL SERVICES, ET AL., APPELLANTS

On Appellants' Petition for Rehearing

Filed April 27, 1972

Before ROBINSON, ROBB and WILKEY, *Circuit Judges*.

Supplemental opinion for the Court filed by WILKEY, *Circuit Judge*.

Supplemental dissenting opinion filed by ROBB, *Circuit Judge*, at p. 9.

WILKEY, *Circuit Judge*: Since the appellant Government's petition for rehearing repeats and amplifies several misconceptions advanced in its first argument, we think it desirable to add these comments to our original opinion, in the hope that those charged with the responsibility of administering the laws may have a more ac-

1. The Civil Service Act[1] did not confer upon the Civil Service Commission power to grant the type interim relief sought here. This seems to be beyond challenge.

2. Nor did the statute remove from the courts the power to grant interim relief. This is beyond challenge if the words of the statute, its plain meaning, and its specific provisions are considered. What the Government argues is that *by implication* the statute and the Congress *must have* intended to do this, because in other provisions the Civil Service Commission is given such complete authority.

The Government is incorrect in its allegation that the court's opinion is inconsistent with congressional intent, since here there has been no manifest congressional intent to disturb the equity powers of the courts. The Government does not seem to perceive that this case involves a very limited principle, and that our opinion does little more than restate the proposition that in some very unusual circumstances a U.S. District Court may exercise its traditional equity powers to prevent irreparable injury. The situation of a temporary employee is not different from many other situations in this respect.

What the Government refuses to face up to is that if the courts are barred from even considering interim relief in this case, it would follow that the courts are barred from considering interim relief in any conceivable type of discharge case that could be brought before the courts. We are unwilling to deny jurisdiction to the courts in all such future cases.

3. Thus the Government's statement of the issue, "Whether a federal employee about to be discharged has

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[1] Act of Jan. 16, 1883, ch.27, 22 Stat. 403; Act of July 26, 1937, ch.522, 50 Stat. 533; Act of June 10, 1948, ch. 434, 62 Stat. 351. For the codification of these statutes see note 33 in our original opinion in this case, slip. op., at 17.

the right to a trial *in district court* prior to the time he exhausts his remedies with the Civil Service Commission, which later will hold a hearing *on the same issues* resolved in the district court proceeding" [emphasis in Governmental Petition], is incorrect. We do not hold that the employee has the right to a trial in the District Court *on the same issues* as are before the Civil Service Commission. All that the District Court should do is to apply the traditional *Petroleum Jobbers*[2] tests to determine whether injunctive relief is appropriate. While this involves a determination, *inter alia,* whether there is any likelihood of success on the merits, *this is not a determination of the merits,* which is the province of the Civil Service Commission in the first instance, and will not be disturbed by a reviewing court if it is based on substantial evidence.

4. Furthermore, while in this case it was inappropriate to conduct the proceedings merely through affidavits, this will not always be the case. Where there are no problems of credibility in the mind of the trial judge (as we had here), it is not inconceivable that a great many applications for injunctive relief can be disposed of through the briefest of hearings, perhaps accompanied by affidavits. This should be particularly true as to the issue of irreparable injury, which is of course necessary for injunctive relief, and which might well be triable by affidavit.

5. The Government does not seem yet to have grasped the distinction between the issue of exhaustion of administrative remedies and the question of the propriety of granting interim relief. This court and others, including commentators such as Kenneth C. Davis and Louis Jaffe, have grasped and articulated this distinction, as made in

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[2] *Virginia Petroleum Jobbers Ass'n* v. *FPC,* 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958).

our opinion (see notes 11-13 and accompanying text). That the Government is making the same error of failing to distinguish the exhaustion cases from those dealing with the propriety of the grant of equitable interim relief is underscored by the fact that, to support its assertion that our decision "conflicts with so many others," they rely again on the same four purely exhaustion cases which we were at some pains to distinguish in our original opinion.

6. The Government's statement that "The majority's conclusion that a wrongfully discharged employee's remedy of back pay (and reinstatement) is not adequate enough to preclude the issuance of injunctive relief is very broad and equally wrong" appears to misread our opinion. This court's opinion merely suggested that in *some* cases of employee discharge back pay and reinstatement *may* not be enough to prevent irreparable injury. This is hardly a "very broad" statement. Further, the court's suggestion in this case appears to be inherent in the holding of *Schwartz* v. *Covington*,[3] nowhere discussed in the Government's petition for rehearing.

The situation and reasoning of the Ninth Circuit are closely parallel to ours here. In *Schwartz* a stay of the petitioner's pending discharge had been issued by the District Court, at the time petitioner's administrative appeal on the merits was in process, as in Mrs. Murray's case. The evidence relied on by the agency (U.S. Army) making the discharge included evidence of acts during a prior enlistment, which had been terminated by an honorable discharge. Under Army Regulations acts committed during a prior enlistment are not available as evidence to support a discharge from a subsequent term of enlistment, or so it was argued. Here Mrs. Murray ar-

[3] 341 F.2d 537 (9th Cir. 1965).

gues that the GSA's decision to discharge her rests on evidence of acts committed during a prior "enlistment," *i.e.*, term of service with another agency. The Government disputes this, but under regulations of GSA itself an employee cannot be discharged *without a hearing* if evidence of service in another agency is relied upon by the discharging agency (GSA).

In *Schwartz* the District Court granted a stay pending administrative review, by the Army Board for Correction of Military Records, on the merits. The Ninth Circuit affirmed, finding irreparable damage to the employee if the stay were not granted, even though full back-pay compensation would be available after administrative review. Here the District Court granted a temporary restraining order pending a hearing, which stay has been continued in effect until a certain GSA official appears to testify. The District Court has not yet reached the stage at which it will decide whether to grant a temporary injunction pending administrative review, here by the Civil Service Commission, as was done in *Schwartz*. We affirm the District Court action staying employee discharge pending administrative review on the merits, as did the Ninth Circuit, holding merely that it is possible that Mrs. Murray may show (or may have shown) irreparable damage, if the hearing before Judge Gasch is allowed to proceed to a decision.[4]

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[4] *Lodge 1858, American Federation of Gov. Emp.* v. *Paine*, 141 U.S. App. D.C. 152, 436 F.2d 882 (1970) is not to the contrary. Judge Robinson's language re exhaustion, quoted and relied on by the Government, *Appellants' Petition for Rehearing and Suggestion for Rehearing In Banc*, at 6, is preceded, significantly, by:

> Resort to the courts must *ordinarily* be postponed until administrative remedies available for rectification of the errors complained of have been exhausted. [Footnote omitted.] And the court, *as a general rule*, must

We cite *Schwartz* v. *Covington* simply to support the proposition that equitable interim relief may sometimes be proper in the case of an about-to-be-discharged federal employee. In *Schwartz* the Ninth Circuit held that such relief was proper, "pending exhaustion of military remedies and judicial review by a United States District Court, during which time appellee retain his present rank and status."[5]

In his dissent to this supplemental opinion Judge Robb criticizes this reliance on the grounds that there is a decision of our court, *Ogden* v. *Zuckert*,[6] which holds that consideration by such an Armed Services review board is not a part of "the administrative process which precedes finality." Whatever the correctness of the *Ogden* court majority (see the closely reasoned dissent by the then Judge Burger), the holding in that case has no application to our reliance on *Schwartz*.

The Ninth Circuit was concerned in *Schwartz solely* with the question of the *propriety of granting interim relief*. The opinion did *not* pass *either* on the merits *or* on the application or nonapplication of the doctrine of exhaustion of administrative remedies; it *assumed* that the doctrine did apply, and simply granted interim relief pending the final administrative determination. In *Ogden*, on the other hand, this court held that the exhaustion doctrine *did not apply*, because the matter had achieved sufficient administrative finality (there was no statute

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stay its hand in reduction in force controversies until administrative resolution of the matters in issue in a proceeding efficacious to that end. [Footnote omitted.] 141 U.S. App. D.C., at 168, 436 F.2d, at 896 (emphasis supplied).

[5] 341 F.2d, at 538.

[6] 111 U.S.App.D.C. 398, 298 F.2d 312 (1961).

requiring further resort to the administrative process); hence, the District Court could proceed to an adjudication of the merits of the dispute, if it chose so to exercise its discretion. In other words, in *Ogden*, unlike *Schwartz*, the question *was* the application or non-application of the doctrine of the exhaustion of administrative remedies.

Murray v. *Kunzig* is a case like *Schwartz* v. *Covington*. We are not concerned with the application or non-application of the doctrine of exhaustion of administrative remedies, but simply with the propriety of the District Court's exercise of its traditional equity powers to grant interim relief. In the view of the Ninth Circuit, Covington had *not* exhausted his administrative remedies before he went to court; in fact, he was busy pursuing such remedies while he was in court. So is Mrs. Murray.

Furthermore, the Government's (and our dissenting colleague's) attempt to distinguish *Scripps-Howard Radio, Inc.* v. *FCC*,[7] *FTC* v. *Dean Foods*,[8] and *Reeber* v. *Rossell*[9] misses the point that our opinion cites these cases merely as examples of the propriety, under certain circumstances, of the granting of interim equitable relief. The court's opinion does not hold, and the trial judge has not yet held, that interim relief *is proper* in Mrs. Murray's case, but we do hold that the trial judge may consider granting such relief, as this is inherent in his historical equitable role.

7. The Government is fearful that every other government employee facing discharge will be able to march into the U.S. District Court, demand the same hearings, and delay a discharge for as long as the appellee Mrs. Murray has. Even if the Government is correct on the deluge of

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[7] 316 U.S. 4 (1942).

[8] 384 U.S. 597 (1966).

[9] 91 F.Supp. 108 (S.D.N.Y., 1950)

cases with which the District Court will be flooded from employees being discharged, this is no reason for misconstruing the language of the statute to evade the District Court's assigned (or, more accurately, not removed) responsibilities.

8. We seriously question the validity of the Government's fears of such a deluge and resulting delay in discharges. Aside from the point that Mrs. Murray has only been able to secure delay because the Government has not permitted the Civil Service Commission to rule on her case, it appears that many government employees (*e.g.*, those with other sources of income, as from an employed spouse) will be so unable to demonstrate the possibility of irreparable injury that their proceedings in the District Court will be of the most limited duration, perhaps going no further than a motion for dismissal by the Government, and a brief duel by affidavits. The ultimate decision by an employee as to whether to contest a discharge must still be made by a litigant and his counsel on the basis of chances for ultimate success, not on the basis of the availability of interim relief in exceptional cases until the Civil Service Commission reaches a decision on the merits. Assuming that the Civil Service Commission is not always reined in by the Government, the Civil Service Commission should dispose of matters such as Mrs. Murray's rather quickly, and the additional time on the job bought by a temporary restraining order or other injunctive relief will not be enough to justify the great legal expense involved, unless there is a good chance of ultimate success.

Our original opinion says nothing about the merits of Mrs. Murray's claim or any other. The lawyer who would cite this opinion before the District Court as a holding on any issue except as a defense against a motion to dismiss for lack of jurisdiction would be ill-advised. We have said nothing which indicates how Judge Gasch or

any other judge should decide such a petition for interim relief on the merits. Only a petitioner who can establish under the test of *Virginia Petroleum Jobbers* that a violation of his rights has most probably occurred will be entitled to interim relief. In Mrs. Murray's case there is some evidence in the sparse record that the General Services Administration did consider her prior troubles at her prior agency employment, and that having done so, the General Services Administration was obligated under its own rules to give her a hearing. It was this evidence in the record that gave Mrs. Murray some hope of success, and gave Judge Gasch some ground to require the attendance of the agency official, who presumably could clear up the matter one way or another.

If our opinion is properly interpreted, there should be no influx of prospectively dischargeable federal employees into the District Court seeking restraining orders. If such occurs, the District Court has a very keenly developed sense for the detection of sham and pretense, and will doubtless deal with such worthless petitions summarily.

The petition for rehearing is accordingly

Denied.

ROBB, *Circuit Judge, dissenting*: I am not persuaded by the explanations and disavowals in the majority opinion on petition for rehearing. Accordingly, I adhere to my dissent, while adding a few words.

In its opinion denying rehearing the majority taxes the government for failing to discuss *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965) in the petition for rehearing. The point is not well taken. In the first place the original majority opinion did not rely on *Schwartz* v. *Covington* as

a major prop for its conclusions; on the contrary, the case was accorded only fleeting mention in footnotes 21 and 22. What is more important, the majority's present reliance on the case is misplaced. The majority now says that in "*Schwartz* a stay of the petitioner's pending discharge had been issued by the District Court, at the time petitioner's administrative appeal on the merits was in process, as in Mrs. Murray's case." There was no "administrative appeal on the merits * * * in process" in the *Schwartz* case. The only military remedy then available to Schwartz was review before the Army Board for Correction of Military Records pursuant to 10 U.S.C. § 1552; and this court has held that consideration by this Board is not a part of "the administrative process which precedes finality". *Ogden* v. *Zuckert*, 111 U.S. App. D.C. 398, 401, 298 F.2d 312, 315 (1961). In other words, Schwartz had exhausted his administrative remedies before he went to court.

In my judgment the doctrine announced by the majority will make the district court the housekeeper and the proctor of the federal civil service. This I think is wrong.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

Civil Action 1053-71

No. 71-1586

JEANNE M. MURRAY

v.

ROBERT L. KUNZIG, ADMINISTRATOR,
GENERAL SERVICES, ET AL., APPELLANTS

Before: ROBINSON, ROBB and WILKEY, Circuit Judges.

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition is denied for the reasons set forth in the supplemental opinion filed herein this date.

Per Curiam

Filed: April 27, 1972.

Circuit Judge Robb would grant appellants' petition for rehearing for the reasons set forth in the supplemental dissenting opinion filed herein this date.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

Civil Action 1053-71

No. 71-1586

JEANNE M. MURRAY

v.

ROBERT L. KUNZIG, ADMINISTRATOR,
GENERAL SERVICES, ET AL., APPELLANTS

Before: BAZELON, Chief Judge; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges.

ORDER

On consideration of appellants' suggestion for rehearing *en banc*, it is

ORDERED by the Court *en banc* that appellants aforesaid suggestion is denied.

Per Curiam

Filed: April 27, 1972.

Circuit Judges Tamm, MacKinnon and Robb would grant appellants' suggestion for rehearing *en banc*.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1053-71

JEANNE M. MURRAY, 1600 South Joyce Street, Arlington, Virginia,, PLAINTIFF

v.

ROBERT L. KUNZIG, ADMINISTRATOR OF GENERAL SERVICES, Eighteenth and F Streets, N. W., Washington, D. C. 20405

and

A. F. SAMPSON, COMMISSIONER, PUBLIC BUILDINGS SERVICE, Eighteenth and F Streets, N. W., Washington, D. C. 20405, DEFENDANTS

TEMPORARY RESTRAINING ORDER

It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending final hearing on the merits by the Civil Service Commission, should issue because, unless defendants are restrained from terminating plaintiff's employment, plaintiff may suffer immediate and irreparable injury, loss and damage before a hearing can be had on plaintiff's claim,

NOW, THEREFORE, IT IS ORDERED, that defendants, their agents, officers, servants, employees, and

attorneys, and any person in active concert or participation with them, be and they are hereby restrained until the determination of plaintiff's application for an injunction and other relief, from, directly or indirectly;

(a) Terminating plaintiff's employment as a Program Analyst, GS-13, by the General Services Administration; and

(b) Taking any other steps, directly or indirectly, to implement, effectuate or in any way carry out the said termination.

IT IS FURTHER ORDERED that the 4th day of June, 1971, at 3 o'clock, p.m., at the United States Courthouse in Washington, D. C., is fixed for the time and place of hearing plaintiff's application for an injunction and other relief.

IT IS FURTHER ORDERED that a copy of this order be served by the United States Marshal on Defendant forthwith.

/s/ Oliver Gasch
OLIVER GASCH
United States District Judge

Issued at 12 o'clock 55.m.

This 28th day of May, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1053-71

JEANNE M. MURRAY, PLAINTIFF

v.

ROBERT L. KUNZIG, *et al.*, DEFENDANTS

TEMPORARY RESTRAINING ORDER

It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim,

NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p.m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders.

IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith.

/s/ Oliver Gasch
OLIVER GASCH
United States District Judge

Issued at 3:08 o'clock, p.m., this 4th day of June, 1971.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1053-71

JEANNE M. MURRAY, PLAINTIFF

v.

ROBERT L. KUNZIG, *et al.*, DEFENDANTS

MEMORANDUM

This matter came on for hearing on plaintiff's motion for temporary restraining order. Plaintiff is a probationary employee of the General Services Administration where she is currently rated as a GS-13, an annual salary of $18,353. By letter dated May 20, 1971, she was advised by W. H. Sanders, Acting Commissioner, Public Building Service, that she had been separated from her position and that her last day in pay status would be May 28, 1971. The reason for her separation was: "You have shown complete unwillingness to follow office procedure and to accept direction from your supervisors." She was advised that she had no right of reply unless she felt the termination was based on discrimination because of race, color, religion, sex, national origin, political reasons, marital status, or physical handicap. She was told that if she desired to appeal the action based on discrimination, she should appeal to the Chief, Appeals Examining Office, U.S. Civil Service Com-

mission, Washington, D. C., at any time after receipt of this notice, but not later than fifteen calendar days after the termination is effected.

The thrust of plaintiff's complaint is that prior to her service with the General Services Administration, which commenced shortly after the first of this year, she was employed by another government agency, namely, the Defense Intelligence Agency. The recommendation of the investigating official of GSA to the official who signed the letter communicating the adverse personnel action, set forth the reasons for his adverse recommendation and also indicated that plaintiff was separated from the Defense Intelligence Agency previously because of a similar experience in that organization.

The applicable regulations of the Civil Service Commission are Subpart H-Probation § 315.801 *et seq.* If plaintiff were separated solely because of unsatisfactory work performance at the General Services Administration, it is conceded that no other personnel action would be required than that set forth in the letter to which reference has heretofore been made.

On the other hand, if her separation was based in whole or in part upon action taken by the Defense Intelligence Agency in terminating government employment which preceded her General Services Administration employment, then regulation numbered 315.805 is applicable. This regulation reads as follows:

> When an agency proposes to terminate an employee serving a probationary or trial period for

reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) *Notice of proposed adverse action.* The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

While the procedure specified in § 315.805 is somewhat different from the procedure followed, it is still summary in character. Essentially it does nothing more than provide a person separated the opportunity to answer the proposed adverse action and additionally it furnishes a broader scope of appeal to the Civil Service Commission in that procedural grounds specified may be raised in addition to those mentioned

in the notice of adverse personnel action which this plaintiff received from her agency.

When these matters were brought to the attention of the Court, recognizing that a probationer's rights are extremely limited, the Court concluded that both in the interest of fairness insofar as plaintiff is concerned and in the interest of resolving expeditiously the issue raised by plaintiff's contention that the government had not followed its own regulations, namely, Section 315.805, the Court concluded that it should resolve the question whether Mr. Sanders, Acting Commissioner of the Public Building Service, who made the decision in question, took into consideration the entire report of his subordinate who investigated the matter or whether he considered only that portion of it which related to plaintiff's General Services Administration service. The Court suggested to government counsel that Mr. Sanders be called so that the matter could be determined. Government counsel refused to call the witness, saying that he was out of the city on leave, whereupon the Court stated that it would like to hear the testimony of the witness and would continue the temporary restraining order until the witness was produced.

The Court is now advised that the government does not intend to call Mr. Sanders.

In at least one case with which the Court has familiarity, namely, *Roberts* v. *Vance*, 119 U.S.App. D.C. 367, 343 F.2d 236 (1964), the government's failure to recognize and follow its own regulations resulted in the ultimate determination by the Court of Appeals that since the government had not fol-

lowed its own regulations, its action in separating Major Roberts was a nullity and ultimately the case resulted in a settlement to Roberts in which the government was forced to pay back salary in excess of $30,000 and recognize his pension rights for the rest of his life. See also *Service* v. *Dulles*, 354 U.S. 363 (1957).

What the government is saying to the Court in this case is that the Court has no jurisdiction to hear a witness and to resolve the question of whether the government followed its own regulations. If it did, this suit should be dismissed. If it did not, it seems to the Court that the matter should be remanded to the agency for the purpose of following the regulations expeditiously without subjecting the government to substantial damages as were ordered paid in the *Roberts* case. The Government by insisting on its understanding of the Court's lack of jurisdiction to consider whether the government's own regulations were followed seems to feel that it is of paramount importance to prevent the Court from considering such a matter as this even though ultimately an adverse decision may subject the government to the payment of substantial accumulated pay.

/s/ Oliver Gasch
Judge

Dictated directly following fact
hearing in the District Court
Date: Filed September 2, 1971

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FILED
JAN 4 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-403

ROBERT L. KUNZIG, Administrator, General Services Administration, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR JEANNE M. MURRAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 403

ROBERT L. KUNZIG, Administrator, General Services Administration, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, JEANNE M. MURRAY

Opinions Below

The opinions of the court of appeals have been reported at 462 F.2d 871.

Question Presented

Whether a federal district court has jurisdiction to grant interlocutory relief pending an adjudication by the Civil Service Commission.

Supplementary Statement

At the close of business on Thursday, May 20, 1971, Mrs. Jeanne M. Murray was handed a letter stating that her employment as a probationary program analyst, GS-13, with the General Services Administration ("GSA") would be terminated the following Friday for failure to follow office procedures and to accept direction. Mrs. Murray had been given no prior notice, formal or informal, of any charges against her nor any opportunity to rebut them. Her job performance had been rated satisfactory the previous month. The letter continued, "You have no right of reply unless you feel this termination was based on discrimination because of race, color, religion, sex, national origin, political reasons, marital status or physical handicap."

The following Tuesday morning, Mrs. Murray's counsel met with Mr. Stan Maher of GSA Personnel to discuss her termination. They requested specifics on the charges against her and an opportunity to reply. Mr. Maher permitted them to see portions of a memorandum setting forth the basis for recommending her termination.

The memorandum contained adverse material about Mrs. Murray's conduct while employed at the Defense Intelligence Agency ("DIA"). Someone in GSA Personnel wrote that someone in DIA said that she had failed to follow office procedures there. Mrs. Murray was never informed of these charges and her record at DIA was in fact excellent.

That afternoon counsel sent a letter to Mr. Maher of GSA Personnel calling his attention to the Civil Service regulation which forbids the termination of a probationary employee "based in whole or in part" on prior conduct with-

out affording a hearing and bona fide consideration of the reply. 5 C.F.R. §315.805.

On the following Thursday afternoon, the GSA informed counsel that Mrs. Murray would not be given a hearing on her termination. Counsel immediately telephoned the Civil Service Commission to determine whether Mrs. Murray's appeal could be decided on an expedited basis in view of the impending termination date and was informed that the Commission's case load would not permit such a procedure.

After appealing to the Commission, Mrs. Murray brought suit in the District Court seeking an injunction to maintain the status quo, *pendente lite,* pending the Commission's decision. Judge Gasch granted a temporary restraining order and set the matter for hearing on a preliminary injunction a week later.

During the preliminary injunction hearing, the government offered in evidence an affidavit from the official who made the final decision to terminate Mrs. Murray. The affidavit stated that the DIA allegations had not entered into his decision in whole or in part. Since the proposed affidavit, when contrasted with the internal memorandum recommending Mrs. Murray's dismissal, raised a very serious question of fact, Judge Gasch determined that the proposed testimony should be given in person. The T.R.O. was then continued until the witness should appear and the hearing could proceed.

The government refused to produce its witness and appealed, alleging that the district court lacked jurisdiction to grant interlocutory relief pending a Civil Service determination and that the court could not require live testimony instead of the proffered affidavit.

The court of appeals affirmed on both points. The court noted that, while such relief should be granted only in "unusual circumstances," in the procedural posture of this case the government's position requires "a declaration of no jurisdiction in the District Court to grant temporary relief under any circumstance." The court refused to grant such a declaration.

The court also held that the district court's power to order live testimony was grounded in the express language of Rule 43(e), F.R.Civ.P. The government has apparently abandoned its contrary contention before this Court.

Reasons Respondent Does Not Object to Granting the Writ

The decision below is neither novel nor unwarranted. Rather, it represents the third reported case in which a fully established principle of equity jurisprudence—the jurisdiction of a court of equity to preserve the status quo pending an administrative decision—was applied in the area of a federal employee discharge. Moreover, experience with the district courts' administration of this principle in the ten months since the court's opinion conclusively refutes petitioner's claim that a flood of litigation has been unleashed.

For these reasons, respondent believes that the court of appeals' opinion was correct and should be affirmed. However, this is the first case of this nature to be presented to this Court. In view of the importance to millions of federal employees of the principle herein established, Respondent believes that this issue warrants the Court's attention and, accordingly, does not object to the writ's being granted.

1. The district court's orders grant relief only until the Civil Service Commission can decide Mrs. Murray's appeal to it.

Courts of equity have exercised the power to grant interlocutory relief maintaining the status quo pending an agency's decision since the inception of the modern administrative process. In early cases, involving determination of titles to land by an administrative agency, injunctions were uniformly issued to restrain waste pending agency decision.[1] With the continuing growth and development of administrative solutions to societal problems, injunctive relief has been granted at the instance of aggrieved individuals[2] and agencies themselves[3] in a variety of situations.

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[1] Olive Land & Development Co. v. Olmstead, 103 F. 563 (C. C. S.D. Cal. 1900); Northern Pacific Co. v. Soderburg, 86 F. 49 (C. C. N.D. Wash. 1898); Elliott v. Rich, 24 N.M. 52, 172 Pac. 194 (1918).

[2] Smith v. Resor, 416 F.2d 141 (2d Cir. 1969) [Induction of army reservist stayed pending military review proceedings]; Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965) [Soldier's discharge enjoined pending action by Discharge Review Board]; West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948) [Rate reduction enjoined pending decision by Maritime Commission]; Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 183 F. Supp. 910 (E.D. Pa. 1960) [Pier operators' truck loading practice enjoined pending decision by Maritime Board]; Reeber v. Rossell, 91 F. Supp. 108 (S.D.N.Y. 1950) [Discharge of federal employee enjoined pending review by Civil Service Commission]; Isbrandtsen Co. v. United States, 81 F. Supp. 544 (S.D.N.Y. 1949), appeal dismissed, 336 U.S. 941 [Implementation of rate agreements enjoined pending review by Maritime Commission]; see, Page Communications Engineers, Inc. v. Resor, No. 24,784, at pp. 1-2 (D.C. Cir. December 4, 1970) (Unreported) [District Court has power to enjoin performance of a contract pending GAO decision at the instance of an unsuccessful contractor]; see generally, Comment, Interim Injunctive Relief Pending Administrative Determination, 49 Colum. L. Rev. 1124 (1949); Note, Human Relations Commissions, 74 Yale L. J. 1171, 1199 n. 141 (1965); L. Jaffee, Judicial Control of Administrative Action, pp. 662-86 (1965).

[3] FTC v. Dean Foods Co., 383 U.S. 597 [Merger enjoined pending FTC decision]; Public Utilities Commission v. Capital Transit Co., 94 U.S. App. D.C. 140, 214 F.2d 242 (1954) [Rate increase enjoined pending decision by P.U.C.].

At least twice before, this principle has been invoked by the courts to stay the discharge of a federal employee. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) (Kaufman, J.).

The relief is limited to those cases in which a party who is actively pursuing an administrative remedy and can show likelihood of success in that pursuit is in danger of being irreparably injured prior to administrative vindication. Where no attempt is made to exhaust the administrative remedy, the principle is, of course, inapplicable. *Ogden* v. *Department of Transportation*, 430 F.2d 660 (6th Cir. 1970); *Hills* v. *Eisenhart*, 256 F.2d 609, 610 (9th Cir. 1958), certiorari denied, 358 U.S. 832. It is also inapplicable where a party claims he need not exhaust the administrative remedy. *American Fed. of Gov. Emp. Local 1904, Local 1498* v. *Resor*, 442 F.2d 993, 995 (3d Cir. 1971). Nor should relief be granted in the face of a record establishing that plaintiff engaged in illegal conduct fully justifying termination. *United States* v. *Professional Air Traffic Controllers Organization*, 438 F.2d 79, 82 (2d Cir. 1970), certiorari denied, 402 U.S. 915.

Petitioner's contention that a remark by Senator Langer during debate was intended as a statement of the Back Pay Act's effect on the traditional jurisdiction of the federal courts and was effective to cause the Act, in the absence of explicit language therein, to limit that jurisdiction is frivolous. This Court has repeatedly refused to impute such an intention to Congress absent explicit statutory language. *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 609; *Scripps-Howard Radio Inc.* v. *FCC*, 316 U.S. 4, 11.

2. Petitioner characterizes this as "a routine probationary employee discharge case." It is hardly so. The government's refusal to produce its witness resulted in the

hearing's being adjourned in mid-hearing before the evidence as to Mrs. Murray's situation could be fully explored.[4]

The court of appeals clearly warned that the application of this principle is limited to the exceptional case. There is every reason to believe that this warning was heeded by the district courts. Of the 12 suits invoking the principle here cited by petitioner (Petitioner's Br., p. 11), 10 were dismissed out of hand. In *American Federation of Government Employees* v. *Fletcher*, D. D.C., No. C.A. 1238-72, a T.R.O. was granted, but later vacated and a preliminary injunction was denied, the district court holding

> "This is not the 'exceptional case' warranting issuance of a preliminary injunction, under the standard for interlocutory court intervention prescribed by the United States Court of Appeals for the District of Columbia Circuit in *Murray* v. *Kunzig*. . . ." *Id.*, *Findings of Fact and Conclusions of Law*, p. 7 (July 27, 1972).

Thus, of the 37,180 potential cases petitioner points to and 12 actual cases brought, there remains only one case in which relief was granted, *Kirk* v. *Kleindienst*, D.D.C., No. C.A. 1397-72. Whether plaintiff in that case met the test of exceptional circumstances is not yet known since the court of appeals has had no opportunity to pass on it.

Thus, the court of appeals should be affirmed.

3. This is not to deny the importance of the legal principle here involved. There are millions of civil servants.

---

[4] The court of appeals made it clear that when the hearing reconvenes Judge Gasch should fully explore Mrs. Murray's claim of irreparable injury and, unless she can show exceptional circumstances, find for the government. However, should the Court desire to be informed as to the evidence Mrs. Murray will present, counsel could meet to agree on an appropriate method of presenting it.

Few if any of them will ever invoke the principle decided here, but that is not the point. Very few of us will ever have occasion to call on the courts to protect the right to speak freely on public matters or to petition the government, but it is important that the protection exist lest the freedom be lost. And the number of those having an indirect interest in establishing that, at least in the direst emergencies, this protection is available, is so great as to justify by itself consideration by this Court.

Moreover, as noted above, there has grown up a major body of law with respect to interlocutory relief pending an administrative determination. On only a few occasions has this Court been presented with an opportunity to delineate authoritatively the scope and limits of this important area of equitable jurisdiction.

Hence, respondent believes the importance of this issue in legal and human terms justifies granting the writ in this case.

CONCLUSION

The writ should be granted and the court of appeals affirmed.

Respectfully submitted,

JOHN T. RIGBY
THOMAS J. MCGREW
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Washington, D. C. 20036
Attorneys for Respondent,
Jeanne M. Murray

Of Counsel:

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January, 1973

APPENDIX

JUN 19 1973

In The

Supreme Court of the United States

October Term, 1972

No. 72-463

Robert L. Kunzig, Administrator, General Services Administration, *et al.*,

Petitioners,

—v.—

Jeannie M. Murray

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 8, 1972

CERTIORARI GRANTED MARCH 19, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-403

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* The court of appeals' opinion, judgment, supplemental opinion, order denying rehearing and order denying suggestion for rehearing *en banc* and the district court's memorandum opinion are not reprinted in this appendix since they are already printed as appendices to the petition.

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RELEVANT DOCKET ENTRIES

No. 1053-71 in the United States District Court for the District of Columbia

Date	Filings—Proceedings
1971	
May 28	Complaint filed; Motion for Temporary Restraining Order filed; Motion for Temporary Restraining Order granted.
June 3	Plaintiff's Motion for preliminary injunction; Motion of defendant to dismiss
June 4	Order continuing temporary restraining order of May 28 until appearance of W. H. Sanders
June 7	Hearing begun and concluded
July 20	Notice of appeal by defendants from order of June 4
	No. 71-1586 in the United States Court of Appeals for the District of Columbia Circuit
July 26	Record on appeal docketed in court of appeals
1972	
February 29	Judgment of the court of appeals affirming order of the district court
April 27	Judgment of the court of appeals denying appellants' petition for rehearing
April 27	Order of the court of appeals denying appellants' suggestion for rehearing *en banc*.
	No. 72-043 in the Supreme Court of The United States
Sept. 8	Petition for certiorari filed
1973	
March 19	Petition for certiorari granted

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PROHIBITORY AND MANDATORY INJUNCTION AND OTHER RELIEF

Plaintiff, Jeanne M. Murray, complains against the Defendants named above as follows:

1. This is an action for a prohibitory injunction restraining Defendant Kunzig, his representatives and subordinates, from terminating Plaintiff's employment as a Program Analyst GS-13 with the General Services Administration until such time as the United States Civil Service Commission can pass on her appeal. In the alternative, Plaintiff seeks a declaratory judgment that the Defendants action in terminating her is unlawful and void.

2. Plaintiff asserts that the termination of her employment was in violation of her rights under Civil Service Regulations, 5 C.F.R. § 315.805, and Ch. 315, Subchapter 8, ¶ 4(b) of the Federal Personnel Manual.

3. This action arises under the laws of the United States. The jurisdiction of this Court is based on 28 U.S.C. §§ 1331, 1361, 2201, 2202; District of Columbia Code, Title 11, § 521; and the Administrative Procedure Act, 5 U.S.C. § 702. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e). The amount in controversy in this case exceeds $10,000, exclusive of interests and costs.

4. Plaintiff, Jeanne M. Murray, is a probationary employee holding the position of Program Analyst GS-13 in the Public Buildings Service of the General Services Administration. Defendant Kunzig is the Administrator of General Service. Defendant Sampson is the Commissioner of the Public Buildings Service. The official residence of both Defendants is the District of Columbia.

5. On May 20, 1971, Mrs. Jeanne M. Murray was given a letter informing her of her separation from her position of Program Analyst. The letter cited "unwilling-

ness to follow office procedure and to accept directions from [her] superiors" as the reasons for her termination. Her termination was to become effective on May 29, 1971. (A copy of this letter is attached hereto as Exhibit A to Appendix II.) On May 25, 1971, counsel for Mrs. Murray, Messrs. John T. Rigby and Thomas J. McGrew, were shown by Mr. Stan Maher, a Personnel Officer of the GSA, a memorandum which gave the specific evidence upon which Mrs. Murray's termination was based. GSA has been unwilling to make available a copy of this memorandum. Mr. McGrew's affidavit is attached hereto as Appendix II.

6. The memorandum had been prepared to familiarize the deciding authority with the case and in accordance with Subchapter 8, ¶ 4(a)(4) of § 315 of the Federal Personnel Manual which states "although it is not required, it is good personnel practice to furnish every separated probationer with enough factual information (as distinguished from conclusions) about his performance or conduct to make the agency's basis for the action clear."

7. The memorandum recited various allegations in connection with Mrs. Murray's performance of her duties while at GSA. It stated that Mrs. Murray had made similar errors in her previous government employment by the Defense Intelligence Agency. The letter also referred to an "Appendix A" for details of the DIA allegations. Plaintiff's counsel were not shown Appendix A and Plaintiff has never seen any portion of this memorandum.

8. Plaintiff was never informed, prior to receiving her termination that the GSA was considering any alleged prior conduct of hers. She was never afforded, either formally or informally, an opportunity to explain or rebut these charges. Even after the decision was taken to terminate her, Defendants have been unwilling to discuss these charges or provide any opportunity for reply.

9. All of this is in violation of Plaintiff's rights under 5 C.F.R. § 315.805, and § 315 Subchapter 8, ¶ 4(b) of the Federal Personnel Manual.

The Federal Personnel Manual, implementing 5 C.F.R.

§ 315.805, provides:

"8-4. SEPARATION OF PROBATIONERS

* * * *

b. For conduct before appointment. (1) When an agency initiates the termination of a probationer for reasons *based in whole or in part on his conduct before employment* . . . the probationer is entitled to notice in advance, a specific and detailed statement of the reasons, the right to reply, consideration of his reply, a decision, and information on his right to ask the Commission to review the *procedure* by which he was separated." C. 315 (emphasis in original.)

10. Plaintiff's information is that her personal file at the Defense Intelligence Agency contains nothing derrogatory to her, but, rather, contains consistently high performance ratings.

11. On May 27, 1971, the GSA notified Plaintiff's counsel that it saw no reason to afford Mrs. Murray a hearing on this matter or any other issue connected with her termination. Immediately thereafter, Plaintiff filed an appeal with the United States Civil Service Commission, which appeal is now pending. (A copy of Plaintiff's appeal is attached hereto as Appendix III.)

12. As a result of the unlawful action by the Defendants, Mrs. Murray may be deprived of her income for an indefinite period of time, and spurious and unrebutted charges against her may remain on the record. She has, moreover, suffered the embarrassment of being wrongfully discharged in the presence of her co-workers.

13. A temporary restraining order enjoining Defendant Kunzig, his representatives and subordinates from terminating Mrs. Murray's employment is essential to prevent immediate and irreparable injury to Plaintiff pending the decision on the merits by this Court or the United States Civil Service Commission. Plaintiff does not have any other adequate remedy at law.

WHEREFORE, Plaintiff prays:

(a) That a temporary restraining order and a prohibitory injunction be issued enjoining Defendants, their

representatives and subordinates, from terminating Mrs. Murray's employment pending a decision on the merits;

(b) That this Court declare and adjudge that Defendants, their representatives and subordinates, have unlawfully terminated Mrs. Murray's employment, as a Program Analyst GS-13 with the General Services Administration;

(c) That Defendants, their representatives and subordinates be permanently enjoined from terminating Mrs. Murray's employment without affording her an opportunity for notice of the charges against her and an opportunity to rebut said charges;

(d) That Defendants, their representatives and subordinates, be ordered to expunge from their records all matters flowing from Plaintiff's unlawful termination;

(e) That Defendants, their representatives and subordinates, be enjoined from making and disseminating statements derogatory to Plaintiff unless Plaintiff has been afforded an opportunity to rebut such statements and bone fide consideration has been given to her response; and

(f) That Plaintiff be awarded such other and further relief as may be just and equitable under the circumstances.

Respectfully submitted,

ARNOLD & PORTER

By /s/ John T. Rigby
JOHN T. RIGBY

By /s/ Thomas J. McGrew
THOMAS J. MCGREW
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

JEANNE M. MURRAY, being first duly sworn, deposes as follows:

1. I am presently employed by the Public Buildings Service of the General Services Administration (GSA) as a Program Analyst, GS-13.

2. On May 20, 1971, at approximately five p.m., I was given a letter signed by Mr. W. H. Sanders, Acting Commissioner of the Public Buildings Service, informing me that my employment was to be terminated as of Saturday, May 29, 1971.

3. I have never been told that GSA's Personnel files contain adverse information about my service in the Defense Intelligence Agency (DIA), nor have I ever seen a memorandum dealing with my employment there.

4. I worked for slightly over a year at the DIA, and I have been informed by the Acting Chief of Staff of the DIA, Rear Admiral D. E. Bergin, that my personnel file at DIA contains nothing derogatory to me.

5. In recent weeks, I was informed by Mr. William Mulroney, a DIA employee, that someone from GSA had been making inquiries of DIA personnel about my term of service there.

JEANNE M. MURRAY

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF THOMAS J. McGREW

WASHINGTON,)
) ss:
DISTRICT OF COLUMBIA)

THOMAS J. McGREW, being first duly sworn, deposes as follows:

1. I am a member of the Bar of this Court and an attorney for Mrs. Jeanne M. Murray, Plaintiff in the above-entitled case.

2. On the morning of May 25, 1971, John T. Rigby, Esq. and I met with Mr. Stan Maher of the Office of Personnel, General Service Administration (GSA), to discuss GSA's termination of Mrs. Murray's employment.

3. In reply to a request for specifics as to the charges against Mrs. Murray, Mr. Maher produced a memorandum which, he stated, had been proposed to familiarize the Commissioner of the Public Buildings Service with Mrs. Murray's case. He told us that the Commissioner alone has the authority to terminate Mrs. Murray's employment.

4. The memorandum contained a general statement of aspects of Mrs. Murray's conduct and attitude which had led to a problem within GSA. It also contained a statement that she had identical problems while previously employed by the Defense Intelligence Agency (DIA) and that the very high ratings on all aspects of her performance at DIA were misleading in that the person who rated her was not her actual supervisor. For further information on Mrs. Murray's DIA experience, the reader was referred to Appendix A of the memorandum, Mr. Rigby and I were not shown Appendix A.

5. Upon returning to our office, I sent a letter to Mr. Maher with regard to the use of the DIA materials. A copy of that letter is attached hereto as Exhibit A.

6. In telephone conversations on May 26, 1971, Mr. Maher told me that he was still seeking an answer to our request for a hearing but that the question of providing us with a copy of the memorandum was in the hands of David Fisher, Esq., of the GSA General Counsel's Office.

7. In a telephone conversation on the morning of May 27, 1971, Mr. Fisher told me that he did not possess the authority to give us a copy of the memorandum but that he would pass on my request and call me back.

8. In the afternoon of May 27, 1971, Mr. Fisher called to deny my request for a copy of the memorandum and Mr. Maher called to deny my request for a hearing. I then telephoned Mr. Herman Staiman of the Appeals Examining Office of the Civil Service Commission to ask if the Commission could take action in Mrs. Murray's case on an expedited basis because of the imminence of Mrs. Murray's termination date, May 29, 1971. Mr. Staiman told me that the Commission's case load did not permit this.

9. On the morning of May 27, 1971, I caused a copy of Mrs. Murray's appeal to be delivered by hand to the Chief, Appeals Examining Office, Civil Service Commission, 1900 "E" Street, N.W., Washington, D.C. 20415.

THOMAS J. MCGREW

Subpart H—Probation

§ 315.801 Probationary period; when required.

(a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period when the employee:

(1) Was appointed from a register;

(2) Was reinstated under § 315.401, unless during any period of service which affords a current basis for reinstatement, the employee completed a probationary period or served with competitive status under an appointment which did not require him to serve a probationary period;

(3) Was appointed under § 315.601(a) as a former employee of the Canal Zone Merit System, unless he satisfactorily completed a 1-year probationary period under that system;

(4) Was appointed under § 315.603(a)(2) on the basis of his former incumbency of a position brought into the competitive service;

(5) Has had his employment converted under § 315.701 or § 315.703 from another type of employment; or

(6) Was appointed under § 315.605 as a former Peace Corps volunteer or volunteer leader.

(b) A person who is:

(1) Transferred under § 315.501; or

(2) Promoted, demoted, or reassigned; before he completed probation is required to complete the probationary period in the new position.

(c) A person who is reinstated from the Reemployment Priority List to a position in the same agency and the same commuting area does not have to serve a new probationary period, but if separated during probation, is required to complete the probationary period in the new position.

§ 315.802 Length of probationary period.

(a) The probationary period required by § 315.801 is 1 year.

(b) The Commission shall publish in the Federal Personnel Manual a statement of the conditions under which

prior service is counted toward completion of a probationary period.

§ 315.803 Agency action during probationary period (general).

The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

§ 315.804 Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period falls to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

§ 315.805 Termination of probationers for conditions arising before appointment.

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) *Notice of proposed adverse action.* The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest

practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

§ 315.806 Appeal rights to the Commission.

(a) *Right of appeal.* An employee may appeal to the Commission in writing an agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Commission's review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) *On discrimination.* (1) An employee may appeal under this subparagraph a termination which he alleges was based on discrimination because of race, color, religion, sex, or national origin. The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(2) An employee may appeal under this subparagraph a termination not required by statute which he alleges was based on political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap.

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) *Time limits.* An employee may submit an appeal at any time after receipt of the notice of adverse decision, but not later than 15 calendar days after the termination has been effected. The Commission may extend the time limit in this paragraph when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit. [33 F.R. 12418, Sept. 4, 1968, as amended at 34 F.R. 5367, Mar. 18, 1969]

§ 315.807 Agency action when Commission recommends restoration or other corrective action.

(a) It is mandatory that the agency take all corrective action recommended in the Commission's initial decision on an appeal unless it makes a timely appeal to the Board of Appeals and Review.

(b) The decision of the Board is final and compliance with its recommendation for corrective action is mandatory.

FEDERAL PERSONNEL MANUAL CH. 315, SECTION 8(4)

SEPARATION OF PROBATIONERS

a. For unsatisfactory performance or conduct. (1) A person selected for appointment through competitive examination is presumed to possess the skills and character traits necessary for satisfactory performance as a career employee. That presumption, however, must be verified through demonstrated capacity during the probationary period. If the appointee fails to demonstrate these characteristics after full and fair trial, his separation for disqualification is proper. This action may be based upon deficiency in duty performance, lack of aptitude or cooperativeness, or undesirable suitability characteristics evidenced by his activities either during or outside official working hours.

(2) Termination action should be initiated whenever the probationer's work performance or conduct fails to demonstrate his fitness or his qualifications for continued Federal employment. Obviously, a decision to terminate should not be made in haste or until the employee has had a full and fair trial. The length of such a trial cannot be described in terms of so many days, weeks, or months. It is whatever time it takes for the agency to appraise the employee's postappointment performance and conduct carefully and to arrive at a considered judgment whether he should be retained or separated.

(3) When separation action is based entirely on deficiencies in performance or conduct *after entrance on duty*, the probationer is notified in writing why he is

being terminated and the effective date of the action. The information in the notice on why he is being terminated must, at a minimum, consist of the agency's conclusions on the inadequacies of his performance or conduct; it need not require complete and specific reasons as with career or career-conditional employees who have completed their probationary periods and have competitive status. The employee is not given a right of reply.

(4) Although it is not required, it is good personnel practice to furnish every separated probationer with enough factual information (as distinguished from conclusions) about his performance or conduct to make the agency's basis for the action clear. One way to accomplish this is to have an appropriate supervisory or personnel official discuss the basis for the agency's action with the employee.

(5) An employee covered by this paragraph may appeal to the Commission on the grounds that his termination was based on discrimination because of race, color, religion, sex, or national origin. An appeal of this kind must be submitted within the time limit prescribed in subparagraph (7). The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(6) An employee covered by this paragraph may appeal to the Commission a termination not required by law which he alleges was based on political reasons or marital status, or a termination which he alleges resulted from improper discrimination because of physical handicap. Such an appeal must be submitted within the time limit prescribed in subparagraph (7).

(7) An appeal to the Commission under subparagraph (5) or (6) may be filed at any time after receipt of the notice of adverse decision, but no later than 15 calendar days after the termination has been effected. This time limit may be extended, at the discretion of the Commission, upon a showing by the employee that he was not notified of the time limit and was not otherwise aware of it, or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

b. For conduct before appointment. (1) When an agency initiates the termination of a probationer for reasons *based in whole or in part on his conduct before employment* (such as the intentional falsification of application forms or other preappointment documents), the probationer is entitled to notice in advance, a specific and detailed statement of the reasons, the right to reply, consideration of his reply, a decision, and information on his right to ask the Commission to review the *procedure* by which he was separated. This requires the agency to give the probationer substantially the same consideration he would have received from the Commission as an applicant, if the derogatory information had come to light before he was appointed.

(2) The notice must state the reasons with sufficient specificity and detail for the employee to be able to understand them and reply to them. It must inform him that he may reply in writing and submit affidavits in support of his reply. It identifies the person or persons or office to receive a reply, and must fix a reasonable time for its preparation and return. The length of time allowed is governed by the difficulty of preparing a reply to the allegations made.

(3) An agency may want to separate a probationer on the basis of information in a Commission report of investigation. When, however, this is information which was secured by the Commission under a pledge of confidence—as opposed to information secured from public records, law enforcement records, or Federal personnel records which could be obtained on request by the employer—the agency is prohibited from using the information in any way which would disclose its source to the employee. At the same time, the agency is required to give the probationer a specific and detailed statement of its reasons for taking action against him; the requirement for specificity and detail is not set aside by the restricted nature of a Commission investigative report, even when the report supplies the reason for the action. There is no restriction, on the other hand, against using the particular information in question if it is obtained

independently by the agency. This may be done as follows:

(a) The employee himself may furnish the necessary information. An interview with the employee is often the best means of developing information concerning previous discharges from employment and other such matters.

(b) The agency may contact the sources named in the Commission's investigative report and obtain their permission to use the information.

(c) The agency may find it possible to obtain the same information from other sources.

(4) The probationer is not entitled to an examination of witnesses nor to a trial or hearing, except at the discretion of the employing agency.

(5) Bona fide consideration must be given to the employee's answer. If the charges are rebutted successfully the employee should be notified that they are being dropped. If mitigating circumstances are present the agency may decide that a lesser penalty than separation from the service is appropriate.

(6) If the agency decides that the employee is to be separated, he must be furnished a written decision on the proposed separation. This notice should be delivered to him as much in advance of the effective date as possible. It must state the reasons, clearly identifying which of the charges or reasons in the advance notice are relied on by the agency, and the effective date. It must inform the employee of his right to appeal to the proper office of the Commission at any time after receiving the decision, but no later than 15 calendar days after the separation is effected. If the employee has been serving in a *de facto* status caused by his appointment being void *ab initio*, the employee should be notified that no further payment can be made to him after receipt of adverse decision whether or not he is carried in an active duty status (38 Comp. Gen. 175, August 29, 1958). Under

these circumstances, if an employee does not want to perform services for which he cannot be paid, the agency may carry him in a nonwork status.

(7) An employee covered by this paragraph may appeal to the Commission on the grounds that his agency failed to observe the procedures described in this paragraph in effecting his termination. This is done by submitting an appeal in writing, pointing out specifically in what aspect the agency failed to comply with those procedures. Such an appeal must be submitted within the time limit prescribed in subparagraph (10).

(8) An employee covered by this paragraph may appeal to the Commission on the grounds that his termination was based on discrimination because of race, color, religion, sex, or national origin. Such an appeal must be submitted within the time limit prescribed in subparagraph (10). The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(9) An employee covered by this paragraph may appeal to the Commission a termination not required by law which he alleges was based on political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap. Such an appeal must be submitted within the time limit prescribed in subparagraph (10).

(10) An appeal to the Commission under subparagraphs (7), (8), or (9) may be submitted at any time after receipt of the notice of adverse decision, but no later than 15 calendar days after the termination has been effected. This time limit may be extended, at the discretion of the Commission, upon a showing by the employee that he was not notified of the time limit and was not otherwise aware of it, or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

c. Agency procedural regulations. In addition to the procedures prescribed by the Commission for terminating probationers, agencies are required to observe their own procedural regulations.

d. Mandatory character of Commission decision on appeals. (1) If the Commission decides in favor of the appellant, it is mandatory for the agency to take corrective action in accordance with the decision and recommendation, unless an appeal is made to the Board of Appeals and Review. Within seven calendar days after receipt of the decision, the agency must report to the Chief, Appeals Examining Office, or to the regional director, as appropriate, that it has carried the decision into effect or that it is appealing the decision to the Board of Appeals and Review.

(2) The decision of the Board of Appeals and Review is final and there is no further right to appeal. A recommendation for corrective action is mandatory and must be complied with by the agency. When corrective action is required, the agency must promptly report to the Board that the action has been taken.

(3) When the Commission recommends restoration of a separated employee, making a position available for him is sometimes a problem for the agency. The position from which the probationer was separated may have been filled, for instance, and the agency may not be able to comply with the restoration order without displacing one or more employees. If the restoration of a successful appellant requires a readjustment in the work force, the readjustment may be accomplished either through the reduction-in-force system or by adverse action against employees affected by the readjustment. If the latter method is used, the readjustments stemming from the restoration order must be shown to be for a cause that will promote the efficiency of the service.

e. Separation at direction of the Commission. When the Commission directs the separation of a probationer, the procedure described in paragraph b above is not required.

f. Timing of separations. In separations under paragraphs a and b above, the employee's separation from the rolls must be effected before the employee has completed his probationary or trial period. Otherwise, the procedures applicable to the separation of a career-conditional employee who has completed his probationary

period are mandatory. To separate an employee before the completion of the probationary period, an agency must separate him before the end of his tour of duty on the last day of probation, which is the day before the anniversary date. Because separations are effective at *midnight* and probationary periods are completed at the *end of a tour of duty*, it is advisable for an agency that wishes to separate a probationer to separate him no later than the day before probation will have been completed. For example:

> A probationary period begins on December 1; the tour of duty is from 8 a.m. to 4:30 p.m. Probation normally will be completed at 4:30 p.m. on November 30 of the succeeding year. A separation made effective on November 30 would become effective at midnight—after the probation has been completed. Therefore, to assure that the separation is made during the probationary period, it is advisable that it be made effective on or before November 29.

g. Processing of separations. Separations under paragraphs a and b above are processed as Termination During Probation.

May 27, 1971

Chief
Appeals Examining Office
United States Civil Service Commission
Washington, D. C.

Dear Sir:

Re: *Appeal of Mrs. Jeanne M. Murray*

At the close of business on May 20, 1971, Mrs. Jeanne M. Murray was given a letter informing her of her separation during probation from the position of Program Analyst, GS-13, by the General Service Administration (GSA),[1] effective May 29, 1971. Mrs. Murray hereby appeals to the Civil Service Commission on the grounds that (1) her separation was based in part on alleged events occuring prior to her employment by GSA without affording her notice of the charges or opportunity to reply as provided by Civil Service Regulations, 5 C.F.R. § 315.805 and Chapter 315, Subchapter 8, ¶ 4(b) of the Federal Personnel Manual and (2) her separation was in part based on political reasons. Attempts to deal with this matter within GSA having failed, this appeal is taken and, by reason of the relatively short notice afforded Mrs. Murray and the permanent adverse effect this action must have on Mrs. Murray's professional career if it goes uncorrected, expedited consideration is requested.

The first information Mrs. Murray had that matters occuring prior to her employment by GSA had been considered in her discharge was obtained by her counsel, Messrs. John T. Rigby and Thomas J. McGrew of the firm of Arnold & Porter, during a conference with Mr. Stan Maher of the GSA Office of Personnel on Tuesday, May 25, 1971. Mr. Maher informed Mrs. Murray's counsel that, in addition to the letter required by regulations, GSA had assembled the specifics on which the decision

[1] A copy of that letter is attached hereto for your convenience as Exhibit A.

to terminate Mrs. Murray was based in accordance with the practice outlined in Federal Personnel Manual, ch. 315, subch. 8, ¶ 4(a)(4).

In this regard, Mr. Maher showed counsel a memorandum detailing for the convenience of the Commissioner of the Public Buildings Service the allegations against Mrs. Murray. That memorandum contained allegations that Mrs. Murray had had certain difficulties while previously employed at the Defense Intelligence Agency (DIA). For specifics on the DIA information, it referred the reader to an "Appendix A" which counsel were not shown. Prior to this time, Mrs. Murray had been given no hint that any such derrogatory information existed or would be used against her. The GSA has refused counsel's repeated requests for a copy of this memorandum.

The Federal Personnel Manual, implementing 5 C.F.R. § 315.805, provides:

> "8-4. SEPARATION OF PROBATIONERS
>
> • • • •
>
> b. For conduct before appointment. (1) When an agency initiates the termination of a probationer for reasons *based in whole or in part on his conduct before employment* . . . the probationer is entitled to notice in advance, a specific and detailed statement of the reasons, the right to reply, consideration of his reply, a decision, and information on his right to ask the Commission to review the *procedure* by which he was separated." C. 315 (emphasis in original).

Mrs. Murray remains unaware of the nature of the allegations reported. She has been led to believe, however, that her superiors at DIA invariably found her job performance to be excellent and that the personnel files at DIA contain no derrogatory information about her.[2] The information used is quite likely to be no more than un-

[2] Mrs. Murray was so informed by a responsible official of DIA at the time she left that agency.

proven office gossip. She is, therefore, clearly prejudiced by being denied her right to reply to these charges.

The memorandum in question, including any appendices, was clearly before the decision-making authority at GSA and formed the basis for his decision. Its contents are, short of an attempt to psychoanalyze the deciding authority, the only available record of the reasons for Mrs. Murray's termination. At this point, no one can genuinely reconstruct the process of decision. The DIA story may have been taken as showing that the charges at GSA were more probable. It may have been a factor in ruling out a transfer or other action short of separation[3] on some theory of general incorrigibility. Whatever can be said of such conjecture, pro or con, the fact is that the memorandum is 100 percent of the available, contemporaneous record of the decision-making process. Nor does the law permit such speculation. In order for any review function to exist, "[t]he grounds upon which an administrative order must be judged are those upon which the record disclosed it was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 271 (1960). "[N]othing is clearer than the principle that we examine the [agency's] reasons and not the subsequent rationalizations of its counsel." *Trailways of New England* v. *CAB*, 412 F.2d 926, 931 (1st Cir., 1969). Likewise, it is clear that, in view of the wide spectrum of actions available to an agency short of terminating an employee, such as warning, transfer or suspension, the use of illegal and prejudicial information can not be termed "harmless error". *Meehan* v. *Macy*, 392 F.2d 822, 839 (D.C. Cir. 1968); *Burkett* v. *United States*, 402 F.2d 1002, 1006 (Ct. Cl. 1968).

Given that these stories were submitted to the deciding authority and that Mrs. Murray was never afforded her

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[3] The Manual clearly contemplates this possibility

> "Bona fide consideration must be given to the employee's answer. If the charges are rebutted successfully the employee should be notified that they are being dropped. *If mitigating circumstances are present the agency may decide that a lesser penalty than separation is appropriate.*" c. 315, subch. 8, ¶ 4 (b) (5) [emphasis added]

right to notice and an opportunity to reply, the decision to terminate her is clearly illegal and must be reversed on this ground alone. She should therefore be reinstated.

As to the events occuring at GSA, the crux of the matter is a disagreement, occuring on or about April 12, 1971, between Mrs. Murray and her immediate superior, Mr. John Stanbury. It was Mrs. Murray's understanding —and this is now confirmed by the GSA memorandum itself—that she and Mr. Stanbury got along well until April 12 and had considerable difficulties thereafter. The dramatically changed attitude on Mr. Stanbury's part is documented by a memorandum he sent her [4] on April 28, making clear that he had been satisfied with her performance up until early April but that something in the interim had changed his attitude radically.[5]

The event which caused the falling out between Mrs. Murray and her immediate superior on April 12 was a memorandum [6] written by Mrs. Murray evaluating the reasons that a particular program designed to improve governmental efficiency was unsuccessful. Mr. Hall, Mr. Standbury's superior, had requested Mrs. Murray's views on this matter. Mrs. Murray concluded that the program in question had never been properly implemented with the result of causing a staggering amount of waste and inefficiency. Her memorandum was designed to call this matter to the attention of her superiors in the Public Buildings Service. This document was sent through the proper channels and appropriate procedures were at all times followed. Mr. Stanbury took great exception to the memo on the grounds that, in effect, Mrs. Murray was "making waves". He told her that, because she had sent this memorandum, he would arrange to "get" her.

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[4] The memorandum is attached hereto for your convenience as Exhibit B.

[5] It can not be overemphasized that, at no point in this dispute has Mr. Stanbury, or anyone else, questioned Mrs. Murray's technical ability to perform her work. To the contrary, he relied on Mrs. Murray for substantial assistance in doing his term papers.

[6] A copy of which is attached hereto for your convenience as Exhibit C.

The subsequent history of this case dramatically illustrates the power of a superior government official to carry out such a threat. Mrs. Murray immediately found herself in an impossible situation. She was accused of taking a careless attitude toward the protection of government files, but, when she purchased a lock to secure certain important project files in her desk, she was accused of locking her desk in violation of "office procedure". She heard, at second hand, reports misrepresenting her remarks during conversations, but, when she thereafter insisted on communicating important matters by memorandum, she was accused of refusing to communicate directly with her superiors. The upshot was that no action which Mrs. Murray could possibly have taken would prove her innocence.

Since this situation did not exist prior to the memorandum incident on April 12 and began immediately thereafter, the only reasonable inference is that Mrs. Murray was being subjected to retaliation for daring to write about governmental inefficiencies and waste. The right of a governmental employee to criticize actions of his employer through proper channels is clearly guaranteed by the First Amendment to the United States Constitution. *Pickering* v. *Board of Education*, 391 U.S. 563, 569 (1968). Such violations of First Amendment liberties are reviewable as political discrimination by this Commission, *Holden* v. *Finch*, —— F.2d ——, Slip Op. No. 23,523 (D.C. Cir. May 17, 1971), and by the courts, *Battle* v. *Mulholland*, —— F.2d ——, 3 C.C.H. Empl. Prac. Bull. ¶ 8150 (5th Cir. March 23, 1971).

Mrs. Murray's dismissal and the events leading up to it have successfully kept the question of whether her opinion was in fact correct from ever being faced up to by those whose duty it is to know. The answer to that question may very well never be known, and it is certainly not before this Commission. But, it is submitted that there is an overwhelming public interest that such questions be raised and that those who raise them not be shuffled out of government.

For the reasons given above, the GSA's decision must be reversed and Mrs. Murray ordered reinstated.

Respectfully submitted,

JOHN T. RIGBY
THOMAS J. MCGREW

ARNOLD & PORTER
1228 19th Street, N.W.
Washington, D. C. 20036
Telephone: 202-223-3200

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

[GSA Emblem]

Public Buildings Service
Washington, D.C. 20405

MAY 20, 1971

Mrs. Jeanne M. Murray
Policy and Planning Division
Office of the Executive Director
Public Buildings Service
Washington, D. C. 20405

Dear Mrs. Murray:

The purpose of this letter is to inform you of your separation from your position of Program Analyst. You are being separated during your probationary period for the reasons that you have shown complete unwillingness to follow office procedure and to accept direction from your supervisors. Your last day in a pay status will be May 29, 1971, and you will be paid for any annual leave due you under current regulations.

You have no right of reply unless you feel this termination was based on discrimination because of race, color, religion, sex, national origin, political reasons, marital status, or phyical handicap. Should you desire to appeal this action based on discrimination, you may appeal to the Chief, Appeals Examining Office, U. S. Civil Service Commission, Washington, D. C. at any time after receipt of this notice, but not later than fifteen calendar days after the termination is effected. Your appeal should (1) be in writing; (2) identify appellant, the agency, the and effective date of the action appealed, and (3) state the reasons why you believe the action appealed is improper.

Mr. Stan Maher, of the Office of Personnel, is available to discuss this matter with you, if you so desire. He is

located in Room 1116, of the General Services Building, and can be reached on 343-6125.

The necessity of this action is regretted.

Sincerely,

W. H. SANDERS
Acting Commissioner
Public Buildings Service

NOTIFICATION OF SATISFACTORY RATING

NAME	PERIOD
Jeanne M. Murray	1/5/71-4/5/71

Your performance has been rated as satisfactory during the indicated period.

RATING OFFICIAL (Signature)	DATE
/s/ John L. Stanbury JOHN L. STANBURY	4/28/71 4/28/71 J.L.S.

Executive Director, PBS—PF

Review of ODCASO Office Landscape Evaluation Report One

A. F. Sampson—P
Commissioner, Public Buildings Service

This report deals with the building shell, furnishings and equipment, and acoustics of the ODCASO Office Landscape Test Project. It presents the following figures on space utilization in the area:

The conventional layout provided an average of 115.04 square feet per employee, and the O.L. plan provided 113.33 square feet per employee. The space savings achieved in this project are minor. The use of microfilmed documents in work areas is a promising method of improving space utilization and should be investigated.

A detailed record of some of the problems with furniture, ceiling baffles, etc., has already been reported. Procedures for solving these problems have been devised, and personnel assigned to carry them out.

Some acoustical testing has also been carried out, and changes are in progress to improve the acoustical privacy of the area. Some of these tests and changes are described in the report.

The evaluation efforts on the ODCASO project are somewhat disappointing, and a concentrated effort is being made to discover the reasons for this. Some of the findings are set forth below.

The total systems approach employed in the analysis of the communications aspects, workflow, records management, etc., of the ODCASO Project produced some significant figures. For example, in one work group of twenty-two people, it was discovered that nine persons checked the printouts against the schedules when errors ranged from only one to two percent. Complete analysis

of this group revealed that through management techniques this group could be more effective as follows:

	Existing	New Preliminary	Percent of Reduction
Workstations	30	20	33%
Worksteps	71	39	45%
Persons involved in ODCASO alone	22	8	60%
Time (days)	8	4	50%
Information Carriers in ODCASO alone	23	11	50%

Quantity of paper can be reduced by 70%

The redundancy of task performances and paper flows within this one group provided an indication of the *magnitude* of the management problems which can be revealed through total systems analysis.

Implementation of the recommendations resulting from the ODCASO analysis would have increased the effectiveness of the group at the expense of creating grave problems for the persons displaced. As a result, the area was provided with the cosmetic factors of office landscaping, but very few of the analytical studies in progress are necessarily incomplete.

In the light of this, as a feasible, temporary measure, it is recommended that the ODCASO Office Landscape Evaluation Report One be accepted, and that the suggestions by the Assistant Commissioner for the six-months' report be accepted.

The foregoing information is not intended to be derogatory, but to point out the significance of the ODCASO Test Project. Total systems analysis is a management tool which will continue to produce evidence of the type revealed in the ODCASO Project. The task of management is to make constructive use of the information obtained from such studies.

GSA, as a large organization with broadly diversified functions, can provide leadership, in improving Government operations, to other agencies by grasping the opportunity presented by the findings of the ODCASO study. Management scientists have advocated for the past twenty years that people not be displaced by changes, but that they be retrained—in house—for labor shortage areas.

GSA, as a service organization, is acutely aware of labor shortages, within GSA, in service categories. With this in mind, why not incorporate the total systems approach to analysis of some of GSA's open space office management areas? If the findings reveal serious overstaffing and ineffectiveness in these areas, why not *retrain the surplus personnel, as employees,* to serve some needed function in the organization?

GSA can also provide leadership here by opening up opportunities for women. For example, why couldn't surplus clerks, both men and women, be trained as mechanics to service GSA's large fleet of motor vehicles?

Service functions can be made attractive by proper motivation techniques. As an example, the airlines have transformed the essentially cooking and serving functions of its flight stewardesses by labeling these employees "hostesses," providing them with attractive uniforms, and paying them an adequate wage. These jobs are widely sought. This type of motivation could be successfully implemented for many, much-needed services in GSA, and an organization of effective people in a balanced employment situation could result.

There are many problems associated with such a pioneering effort, such as dealing with the rigid, categorized employment rules of the Civil Service Commission.

However, these problems are not insurmountable, and GSA has much to gain in taking the lead in such a program.

I. E. FRIEDLANDER

Enclosure

cc: Official File—PFPA
Mr. Hall—PFP
Mr. Price—PL
Mr. Friedlander—PF

Ticket No. 112 Due: 4-12-71

PFPA:JMURRAY:pbe X6816

Concurrences: PFP _____ PL _____

Actg. Dir., Policy & Planning

Confd. Assistant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff hereby moves this Court for a temporary restraining order in the form attached hereto.

This motion is based on the grounds that immediate and irreparable injury, loss and damage will result to plaintiff unless the motion is granted, as more particularly appears from the complaint and affidavits herein, together with attached exhibits.

Respectfully submitted,

ARNOLD & PORTER

JOHN T. RIGBY

THOMAS J. MCGREW

Attorneys for Plaintiff

1229 Nineteenth Street,
N.W.
Washington, D.C. 20036
223-3200

Dated: May 28, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

TEMPORARY RESTRAINING ORDER

It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending final hearing on the merits by the Civil Service Commission, should issue because, unless defendants are restrained from terminating plaintiff's employment, plaintiff may suffer immediate and irreparable injury, loss and damage before a hearing can be had on plaintiff's claim,

NOW, THEREFORE, IT IS ORDERED, that defendants, their agents, officers, servants, employees, and attorneys, and any person in active concert or participation with them, be and they are hereby restrained until the determination of plaintiff's application for an injunction and other relief, from, directly or indirectly:

(a) Terminating plaintiff's employment as a Program Analyst, GS-13, by the General Services Administration; and

(b) Taking any other steps, directly or indirectly, to implement, effectuate or in any way carry out the said termination.

IT IS FURTHER ORDERED that the 4th day of June, 1971, at 3 o'clock, p.m., at the United States Courthouse in Washington, D.C., is fixed for the time and place of hearing plaintiff's application for an injunction and other relief.

IT IS FURTHER ORDERED that a copy of this order be served by the United States Marshal on Defendant forthwith.

/s/ Oliver Gasch
United States District Judge

Issued at 12 o'clock 55 p.m.
This 28th day of May, 1971.

[Attest and Plaintiff's Undertaking Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Jeanne M. Murray, Plaintiff in the above-entitled case, moves this Court for a Preliminary Injunction for the reasons set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

JOHN T. RIGBY
THOMAS J. MCGREW
Attorneys for Plaintiff

ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
Telephone: 202-223-3200

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

MOTION TO DISMISS

Defendants through their attorney, the United States Attorney for the District of Columbia respectfully move the Court to dismiss the above entitled cause for failure to state a claim over which this Court has jurisdiction or upon which it can grant relief.

/s/ THOMAS A. FLANNERY
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ Ellen Lee Park
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

TEMPORARY RESTRAINING ORDER

It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim,

NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p.m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders.

IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith.

/s/ Oliver Gasch
United States District Judge

Issued at 3:08 o'clock, p.m., this 4th day of June, 1971.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1053-71

JEANNE M. MURRAY, PLAINTIFF

v.

ROBERT L. KUNZIG, and A. F. SAMPSON, DEFENDANTS

Washington, D. C.

June 4, 1971

The above-entitled cause came on for hearing, pursuant to notice, before the HONORABLE OLIVER GASCH, United States District Judge, at 2:00 p.m.

APPEARANCES:

On behalf of the Plaintiff:
THOMAS J. MCGREW, ESQ.

On behalf of the Defendants:
ELLEN LEE PARKS, ESQ.

PROCEEDINGS

THE DEPUTY CLERK: Civil Action 1053-71, Murray versus Kunzig.

MR. McGREW: If Your Honor please, the crux of this case is one of the regulations that the probationer has a right not to be terminated in all or in part for reasons based on prior conduct without the probationer's having noticed.

The other part of this case, Your Honor, the probationer would show she was terminated. The reason the Court granted T.R.O. was this issue concerning the prior employment.

THE COURT: I am inclined to agree with you. Mrs. Parks the reason the Court granted the T.R.O. concern-

ing this issue or prior employment. I would like to be certain that the G.S.A. people are clean on this. It is one thing to say, "Yes, we knew all the prior employment," and another thing to say, "We knew about it and we didn't take it into consideration." You expect the Government—I am not talking about you, I am talking about the Government—to be candid with the Court under these circumstances, and there are plenty of people in the Government and I know them, and I am sure you know them that seek to avoid the impact of a regulation by saying, "Oh, no, we didn't have that conduct in mine, we just recognized what we did in our agency." That is the point about this case.

MRS. PARKS: Well, Your Honor, I myself convey the view to the agency if they had any doubt that she was entitled to this regulation, in my opinion, they should give serious consideration to giving her these features. They satisfied me, Your Honor, that the decision was based solely on her conduct.

Now, this memo upon which plaintiff relies is a recommendation to the deciding authority. It is not a decision of the deciding authority. The decision of the deciding authority gives two reasons, and those are based on her conduct with the agency.

THE COURT: Is it reasonable to assume that the "Deciding Authority," knew that the regulation was enforced and in effect and if any mention were made of it, that he would have to go through procedures which are considerably more onerous.

MRS. PARKS: He did not mention—well, yes.

THE COURT: Well, whether he mentioned it, it is a question whether he had it in mind.

MRS. PARKS: Well, we could only tell that by psychoanalyzing as counsel suggest. Mr. Sanders has been out of town all week. An affidavit was prepared for his signature, and he was advised by me by phone, and he won't sign it. He based his decision solely on her conduct with the agency during the time she was employed. If the affidavit will satisfy you any better than his letter, we will submit that. I submit there is no way in the world for this Court or anybody else can determine

what was in his mind other than what he tells us. He is prepared to give an affidavit to that effect.

What is more, Your Honor, if there is some merit to this point, plaintiff must pursue her remedies before the civil service commission before this Court has any equitable jurisdiction.

The cases are legion on this, and I am prepared to give you even additional ones to those we cited in the memorandum. This Court has no jurisdiction to consider this matter at this juncture when plaintiff has pending before the civil service commission an appeal from that action.

THE COURT: I remember something an old friend of mine use to tell me when I was District Attorney. I am referring to Judge Pine.

MRS. PARKS: He was a friend of mine.

THE COURT: Judge Pine use to say, "I may be impotent, but I don't like the Government lawyers telling me I am." and that is the way I fell about this no jurisdiction business.

MRS. PARKS: Well, if Your Honor please, the cases are uniform in that in the Supreme Court up and down, even the First Circuit which decided the Wetter Case has changed its view, and I have the case on that where they now adopt the view which is true in this jurisdiction that until administrative remedies are exhausted, this Court has no power to act in these matters.

The Supreme Court said so in Myers and said the District Court erred in granting an injunction, the Court of Appeals should have reversed it on lack of jurisdiction. The First Circuit said after the Wetter Case and said it after the Fitzpatrick Case. The Court of Appeals has said it over and over again.

With all due respects to Your Honor, I think you should consider these cases binding on you.

THE COURT: All right. What do you have to say about my impudency?

MR. McGREW: If Your Honor please, I think the cases are very legion to say Your Honor is very virile in this case. I think Your Honor that might help to clarify, I think we might be talking about cross purposes a little bit.

On the one hand, there is a whole string of cases that counsel for the defense has cited on the question of primary jurisdiction and civil service commission and so on.

We would prefer to keep out of that morass, Your Honor, and get into the straight question of the court of equity's power to issue an injunction pending a decision by the administrative agency itself. The cases are legion on that when that occurred. If you attempt to read the Young Case for the proposition that you can't get into Court at all, I think our Court of Appeals has rejected that reason. In the Ogden versus Zuker, the same argument was made, and the Court said the secretary relies on young and hagley. None of this seems to be quite in point. The administrative remedy available in that case was prior to the administrative action becoming final which is not our situation.

THE COURT: Administrative action is not final in this case. It would have been but for the T.R.O.

MR. McGREW: But for the T.R.O., it would have been final. We are not asking Your Honor to go so far as to oust the deciding authority. We are asking Your Honor to give some relief pending a decision as to retain jurisdiction hopefully after that decision.

THE COURT: Mrs. Parks, the advice you gave GSA, of course, I know that agencies don't always follow the advice they get from experienced Government counsel, but they follow the regulations which plaintiff says that is applicable in which they deny. It probably would be not only the fairest way but the most justly to solve the problem.

MRS. PARKS: I want to correct any misapprehension, Your Honor, I did not advise them, I said if they were not satisfied that the sole reason for her discharge, I suggested that. They have conferred with everybody concerned and are satisfied they even called long distance to the man who made the decision. They are satisfied it was his decision, and as Your Honor knows, our office does not interfere in the internal management of an agency if that is there decision. I cannot go behind his mind, and I don't believe anybody else can, but again, I urge upon Your Honor that this doctrine and also with

respect to keeping her on the payroll. The First Circuit has spoken on that and I have a decision in the Fitzpatrick Case if Your Honor would like to look at it where Chief Justice McGruder said it would constitute an uncontested suit because you are paying money out of the U.S. Treasury, causing money to be paid out where there is no consent. Congress has specifically provided by the back pay statute that these people should be reimbursed subsequent to final litigation and not during it.

THE COURT: I always remember the years when I was U.S. Attorney, conversations with Mr. Philip Young who is a close personal friend who is chairman of the civil service commission, and he was upset about many of these decisions in which judges unwarrantly interfered with the operations of his commission and other government agencies. I said to him at that time, "You've got so many protective regulations that are on the books and are binding on you, it is might as well wipe them all off if you act the way you want to act," but they never did. And time and time again, we see the Government voted to act expeditiously afforded by a regulation they don't want to follow.

MRS. PARKS: If Your Honor please, I believe every regulation has been followed in this case.

THE COURT: Well, that is what this man who is presently unavailable as a witness said. The thing that strikes me is that the paper which you filed with me that consideration was given to her prior employment.

MRS. PARKS: By the man recommending dismissal to the deciding authority.

THE COURT: To whom did he forward his recommendation?

MRS. PARKS: To the deciding authority and it eventually reached him. The deciding authority said, "I decided solely on her conduct while she was there."

THE COURT: How do I know that?

MRS. PARKS: He says so.

THE COURT: Well, time has long since passed I believe everything a witness tells me.

MRS. PARKS: If Your Honor please, that is what the record says and that is what is before you. In the

Environmental Defense fund, the Court of Appeals says the Court must accept the reasons given by the agency. Judge Bazelon has said the Court must accept the reasons given by the agency, not what might have been a reason. There are many cases on that, Your Honor.

THE COURT: Well, I remember a statement often attributed to Judge Goldberg of this Court many years ago. As you recall, he didn't care much for psychiatrist. He was one of the few judges who had a certificate showing he was sane, because he had extensive experience with psychiatrists at an earlier date. I can remember him presenting cases before him, and when he would instruct a jury, he would raise a piece of paper like that and say, "Ladies and gentlemen, you have heard the testimony of Dr. X. He is an eminent psychiatrist and I have told you about expert witness testimony. You should give due consideration to that, but he says, ladies and gentlemen, you can see the color of this piece of paper. If somebody tells you it is blue you don't have to believe it. Take the case ladies and gentlemen."

They usually got the point.

MRS. PARKS: There you have a witness before Your Honor, and you are able to hear—

THE COURT: I believe we had better have this witness before the Court.

MRS. PARKS: I would object to that, Your Honor, the cases are legion on that, the cases reviewed on the administrative record and not by witnesses—

THE COURT: I will hear the testimony of the witness. I will make up my mind as to whether he is telling the truth.

MRS. PARKS: If Your Honor please, you want to call him as your witness, Your Honor?

THE COURT: I don't have any objection. I have extensive experience with GSA people in the past. I will probably have more experience in the future.

MRS. PARKS: If Your Honor please, I consider that it would be error for you to endeavor to ascertain the merits of a case in this matter. I would object to it, Your Honor.

THE COURT: All right, Mrs. Parks, your objection is noted.

MRS. PARKS: Very well.

THE COURT: When is he going to be available?

MRS. PARKS: To my understanding, he will be in town on the 7th of June.

THE COURT: Where is he now?

MRS. PARKS: He is out of town. As I understand he is on annual leave. I don't know exactly where.

THE COURT: California is about six hours away.

MRS. PARKS: Well, I would like to find out where he is, but I don't know.

THE COURT: All right, I will hear from him. Let me know when he can be available.

MRS. PARKS: Very well. In the meantime—

THE COURT: The T.R.O. will be continued until he shows up.

THE DEPUTY CLERK: Do you want to present an order on that, Mr. McGrew?

MRS. PARKS: We would like an increase in bond now, Your Honor. The record shows this woman's salary and the bond is not sufficient to cover the expenses of the Government. She is paid better than $350.00.

THE COURT: Let the man come in and I will hear him today.

MRS. PARKS: I have no assurance we can get in touch with him, Your Honor.

THE COURT: Tell the agency I will continue the temporary restraining order until the witness appears.

MRS. PARKS: Without any increase in the bond?

THE COURT: Right, because the Government has within its power to bring him in.

MRS. PARKS: I don't know what power we have. He is on annual leave, and I don't know how we can even get in touch with him.

THE COURT: Annual leave doesn't mean anything to me. We all take leave, we can all show up when necessary.

MRS. PARKS: I will see what I can do.

THE COURT: Thank you, Mrs. Parks.

MR. McGREW: We don't have an order for your Honor.

THE COURT: Will you have one here today?

MR. McGREW: We will have it here.

(Whereupon, at 2:18 p.m. the above-entitled cause adjourned sine die.)

CERTIFICATE OF OFFICIAL REPORTER

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Duane B. Duschaine
DUANE B. DUSCHAINE
Official Reporter

SUPREME COURT OF THE UNITED STATES

No. 72-403

ROBERT L. KUNZIG, Administrator, General Services Administration, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ORDER ALLOWING CERTIORARI—Filed March 19, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 505468 680

JUL 6 1973
MICHAEL RODAK, JR., CLERK

No. 72-403

In the Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-403

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The initial (Pet. App. 1a-22a) and supplemental (Pet. App. 24a-33a) opinions of the court of appeals are reported at 462 F. 2d 871. The opinion of the district court (Pet. App. 39a-43a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a) was entered on February 29, 1972, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on April 27, 1972 (Pet. App.

34a-35a). On July 20, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 9, 1972, and on September 8, 1972, the petition was filed. The petition was granted on March 19, 1973 (App. 45). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a routine probationary employee discharge case, the district court may properly order an agency to retain the employee until after she exhausts her remedies with the Civil Service Commission.

STATUTE AND REGULATIONS INVOLVED

5 U.S.C. 5596(b) provides:

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—
>
> > (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel

action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The provisions of 5 C.F.R. 315.801-315.807 are set forth at App. 9-12.

STATEMENT

Respondent Jeanne M. Murray was hired as a program analyst in January 1971 by the Public Buildings Service, General Services Administration, at an annual salary in excess of $18,000 (S. App.).[1] Under the applicable regulation of the Civil Service Commission (5 U.S.C. 315.801), respondent's career conditional appointment was subject to a one-year probationary period.

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[1] "S. App." refers to the sealed appendix on file with the Clerk of this Court containing respondent's personnel file. Pursuant to respondent's request, her personnel file was submitted to the district court and the court of appeals for *in camera* inspection only. We have agreed with respondent's counsel to follow the same procedure in this Court and thus have lodged the personnel file with the Clerk of this Court in a sealed envelope with the understanding that the file will not be available for public inspection.

On May 20, 1971, respondent was advised in writing by W. H. Sanders, the Acting Commissioner of the Public Buildings Service, that she was to be discharged from her position effective May 29 for her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors" (App. 25-26).[2] The notice complied with the applicable Civil Service Commission regulations governing the discharge of federal probationary employees if her dismissal was based exclusively on conduct occurring during the probationary period. See 5 C.F.R. 315.804. If, however, her discharge was in fact based in whole or in part on conduct occurring prior to her appointment by the General Services Administration, she was entitled under 5 C.F.R. 315.805 to additional procedural rights. Those rights include advance notice of the proposed action against her, an opportunity to reply in writing and with supporting affidavits, and notice of an adverse agency decision on or before its effective date.

Following the receipt by respondent of Mr. Sanders' letter, respondent's counsel met with a GSA personnel officer to discuss respondent's termination (App. 7). Counsel were shown a memorandum (S. App.) from an officer of the Public Building Service upon which Mr. Sanders based his decision to terminate respondent's employment (App. 7). The two-page memorandum describes respondent's conduct as

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[2] Although a part of respondent's personnel file, Mr. Sanders' letter is part of the public record in this case and is thus included in the printed appendix.

a probationary employee and contains a recommendation that, "based on performance in her present position during her probationary period," she should be separated from the GSA (S. App.). The memorandum goes on to relate that an investigation had shown that respondent's conduct during her previous employment in the Defense Intelligence Agency had also been unsatisfactory; a one-page attachment to the memorandum summarized the comments of the persons consulted at that agency (S. App.).

Respondent thereupon filed an administrative appeal with the Civil Service Commission (see 5 C.F.R. 315.806(c)) alleging that her termination was based in part on conduct occurring prior to the probationary period and that she was thus entitled to the additional procedural rights set forth in 5 C.F.R. 315.805 (App. 19-24). Respondent's request that her appeal be considered on an expedited basis was denied (App. 8).

While her administrative appeal was pending, respondent instituted this suit in the district court seeking an injunction against her proposed discharge and a declaration that it was invalid (App. 2-5). Respondent alleged in her complaint that the result of the contemplated termination would be to deprive her indefinitely of her income, to permit "spurious and unrebutted" charges against her to remain on the record, and to subject her to the "embarrassment of being wrongfully discharged in the presence of her co-workers" (App. 4). Respondent claimed that, in the absence of injunctive relief, her employment would

be terminated during the pendency of her administrative appeal, thereby causing her irreparable injury (*ibid.*).

On May 28, 1971, one day before respondent's scheduled termination of employment, the district court issued a temporary restraining order barring respondent's discharge until her motion for a preliminary injunction could be heard (App. 33). At the hearing on the motion, the district court determined that a crucial issue to be resolved in the proceeding was whether Mr. Sanders had based his decision to discharge respondent solely on respondent's conduct during her period of probation (App. 37-38). Rejecting the government's offer to produce an affidavit from Mr. Sanders (App. 38-39), the court stated that it wanted him to appear personally before the court and testify so that the court could "make up [its] mind as to whether he is telling the truth" (App. 42). Accordingly, the earlier stay of respondent's discharge was continued pending the appearance of Mr. Sanders (App. 36).

The court subsequently issued an opinion concluding that it had jurisdiction to enjoin respondent's discharge, and that the granting of such relief would depend in part upon the court's determination "whether the government followed its own regulations" in discharging respondent (Pet. App. 43a). Pending review of the district court's action, the government has not produced Mr. Sanders to testify and the Commission has not processed respondent's appeal.

A divided court of appeals affirmed (Pet. App. 1a-22a). The court noted that the Civil Service Commission has no authority to stay a discharge pending administrative review, although it can award back-pay and order reinstatement (Pet. App. 3a, 10a). The court held, however, that the district court has general equity power to grant a preliminary injunction to prevent irreparable injury during administrative proceedings and that this power includes the power to conduct an evidentiary hearing on disputed factual matters (Pet. App. 8a-15a). The dissenting judge stated that the majority's "broad and novel" holding did violence to the statutory scheme governing the dismissal and reinstatement of federal employees (Pet. App. 19a).

In denying a petition for rehearing, the court issued a supplemental opinion stating that this case involves the "very limited principle * * * that in some very unusual circumstances a U. S. District Court may exercise its traditional equity powers to prevent irreparable injury" (Pet. App. 25a). The full court denied the government's suggestion for rehearing *en banc* by a vote of 6 to 3 (Pet. App. 35a).

SUMMARY OF ARGUMENT

1. Traditionally, the federal courts, in the absence of legislation, have had little or no role to play in the appointment or removal of federal employees. See *Matter of Hennen*, 13 Pet. 230; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896. Similarly, this Court has held that the federal courts

have no general equity jurisdiction to enjoin a federal employee discharge even though the discharge violates civil service regulations promulgated pursuant to statute. *White* v. *Berry*, 171 U.S. 366. The question in this case is thus not, as the court of appeals assumed, whether traditional equitable powers have been curtailed by Congress, but whether the courts should interfere with the comprehensive administrative procedures established to protect federal employees by fashioning novel equitable remedies which are inconsistent with that scheme.

2. Over the years, a comprehensive administrative procedure for the removal and reinstatement of federal employees has been developed by statute, executive order and regulation. Under current regulations, probationary employees may be terminated summarily; under sharply limited circumstances, they may appeal their terminations to the Civil Service Commission, but they are not entitled to evidentiary hearings before that agency. In the event their terminations are found to have been unwarranted and the employees are reinstated, they are entitled to backpay under 5 U.S.C. 5596.

3. The temporary enjoining by the district courts of probationary employee terminations is inconsistent with the administrative scheme governing employee discharges and would seriously disturb the balance achieved between the rights of federal employees and the interests of the government in maintaining an efficient civil service. Probationary employment by definition is a trial period during which summary ter-

mination is specifically authorized in the event the probationary employee proves to be unqualified. In enacting the Back Pay Act, Congress recognized the right of federal agencies summarily to discharge federal employees and provided backpay as the exclusive remedy for the loss of wages due to wrongful discharge.

The consideration of motions for interim relief by the district courts interferes unduly with the role and autonomy of the Civil Service Commission. With respect to probationary employees, the scope of the proceedings before the district courts on such motions will be far broader than the scope of the appeal proceedings before the Commission. Under such circumstances, the role of the Commission in resolving employee disputes could to a considerable extent be preempted by the district courts. Moreover, the ruling of the court below does not, as it stated, involve only a "limited principle," since many discharged federal employees can easily make allegations of irreparable injury similar to those respondent made.

4. This case does not involve the traditional equitable powers of appellate or reviewing courts to preserve their jurisdictions. See *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4; *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. Both *Scripps-Howard* and *Dean Foods* construed the All Writs Act—authorizing federal courts to issue writs "in aid of their respective jurisdictions" (28 U.S.C. 1651 (a))—to permit courts of appeals to enjoin agency action either to prevent ir-

reparable injury pending completion of judicial review proceedings that had been initiated or to preserve the status quo so that later effective appellate review would be possible.

In this case, no judicial review proceedings were pending and the interim injunction sought by respondent was not necessary to preserve the district court's jurisdiction to review any eventual adverse decision by the Civil Service Commission on respondent's administrative appeal of her termination. The decision below is thus not supported by the All Writs Act. Finally, Section 10(d) of the Administrative Procedure Act, 5 U.S.C. 705—which for the most part codified existing law reflected by this Court's decision in *Scripps-Howard*, *supra*—does not authorize the enjoining of probationary employee discharges pending resolution of appeals to the Civil Service Commission.

ARGUMENT

THE DISTRICT COURTS MAY NOT ORDER FEDERAL AGENCIES TO RETAIN TERMINATED PROBATIONARY EMPLOYEES BEYOND THEIR TERMINATION DATES UNTIL THEY EXHAUST THEIR ADMINISTRATIVE REMEDIES WITH THE CIVIL SERVICE COMMISSION

A. Introduction

Under long-standing decisions of this Court, the federal courts, in the absence of legislation, have had little or no role to play in the appointment or removal of federal employees. See *Matter of Hennen*, 13 Pet. 230; *Keim* v. *United States*, 177 U.S. 290; *Eberlein*

v. *United States*, 257 U.S. 82; *Myers* v. *United States*, 272 U.S. 52; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896. In *Matter of Hennen*, *supra*, a federal district court clerk challenged his removal by the district judge; the district judge had acknowledged the clerk's competence and that the appointment of a replacement clerk was simply for personal reasons. This Court held that it had no power to review the grounds of removal of the clerk (13 Pet. at 261), since, unless otherwise specified by the Constitution or by statute, all federal officers are held "at the will and discretion of some department of the government," and subject to removal at pleasure (13 Pet. at 259).

Similarly, in *Keim* v. *United States*, 177 U.S. 290, the Court refrained from reviewing the grounds for discharging a federal employee, holding that such matters are "peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers" (177 U.S. at 296).

The government's right to remove federal employees may not, of course, be exercised in a discriminatory manner or as a means of curbing legitimate freedom of expression. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183, 191-192; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. But within those limits, the Court has reaffirmed in recent years the "settled principle that government employment, in the

absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 896.[3]

As a corollary to the principle that government employment can be revoked at will in the absence of legislation, the Court ruled long ago in *White* v. *Berry*, 171 U.S. 366, that the federal courts have no general equity jurisdiction to enjoin the discharge of a federal employee, even when it is alleged that the discharge would violate civil service rules promulgated pursuant to a statute enacted by Congress. The Court held that, whatever remedies discharged employees might have at law, their discharges "cannot be restrained by a court of the United States, sitting in equity," since "[i]nterference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs" (171 U.S. at 378).

In short, the federal courts have only a limited role in federal employment matters and have no general or historic equity jurisdiction thereover. The court of appeals therefore incorrectly assumed that the question for resolution in this case was whether Congress, in enacting the Civil Service Act or the Back Pay Act, had eliminated the equity jurisdiction of the district courts so that they could not "continue to perform their historic role and grant equitable relief in the exceptional cases which may arise in this

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[3] For a full discussion of this point, see our brief on the merits in *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted, April 2, 1973.

area" (Pet. App. 10a-11a, n. 21; see also Pet. App. 17a, 25a). In fact, the district courts have not historically or traditionally granted equitable relief in federal employment cases. The question is thus not whether Congress has taken away those equitable powers, but whether the courts should interfere with the comprehensive administrative scheme governing the removal and reinstatement of federal employees by fashioning equitable remedies which are inconsistent with that scheme. It is to the administrative scheme that we now turn.

B. There is a Comprehensive Administrative Scheme Governing the Removal and Reinstatement of Federal Employees

1. In 1883, Congress enacted the Civil Service Act establishing the United States Civil Service Commission. 22 Stat. 403. While the Act was primarily concerned with the screening of applicants for federal employment, it also contained a substantive provision freeing persons in the public service from "any obligations to contribute to any political fund, or to render any political service" and prohibiting their removal for refusing to do so. 22 Stat. 404. In the succeeding years, various rules were promulgated from time to time under the Act prohibiting the removal of employees from positions subject to competitive examination except for "just cause" (Civil Service Commission, *14th Annual Report*, p. 133 (1898)) or for "such cause as will promote the efficiency of the public service" (Civil Service Commission, *20th Annual Report*, p. 60 (1904)), but these non-statu-

tory rules could be and were weakened by amendment (see Civil Service Commission, *22d Annual Report*, pp. 62-63 (1905)).

To provide certain federal employees with more permanent protection against arbitrary discharges, Congress, in 1912, enacted the Lloyd-LaFollette Act, 37 Stat. 555 (now codified, as amended, at 5 U.S.C. 7501). That Act provided that no person in the "classified civil service" could be removed except for such cause as would "promote the efficiency of said service," and then only after he had been given notice of, and an opportunity to answer, the charges against him. 37 Stat. 555. In Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390-391 (now codified, as amended, at 5 U.S.C. 7701), Congress took another step in protecting federal employees by providing for a right of appeal to the Civil Service Commission by a discharged permanent civil service employee entitled to a veteran's preference. This right of appeal to the Commission was extended to most employees in the competitive civil service by Commission regulations (27 Fed. Reg. 4759; now 5 C.F.R. 752.101-752.402) adopted pursuant to Section 14 of Executive Order No. 10988, January 17, 1962, 27 Fed. Reg. 556.

Under current Commission regulations, a permanent civil service employee against whom adverse action is contemplated is entitled to 30 days' advance written notice stating in detail the reasons for the proposed action. After the employee has had an opportunity to reply, he is entitled to notice of an adverse decision with a statement of the grounds of

the decision on or before the effective date of the adverse action. 5 C.F.R. 752.202.[4] Following the adverse decision, the employee may appeal either directly to the Civil Service Commission (5 C.F.R. 752.203) or first appeal to his agency under its appeals system (5 C.F.R. 771.205), followed, if necessary, by an appeal to the Commission. In any appeal to the Commission, the permanent employee is entitled to a full evidentiary hearing and an initial decision by a regional office of the Commission. 5 C.F.R. 772.305, 772.306. A final appeal from the initial decision lies with the Commission's Board of Appeals and Review. 5 C.F.R. 772.307.

In contrast to the comprehensive administrative procedures available to permanent civil service employees to contest their discharges, probationary employees have limited protection from discharge. Under 5 C.F.R. 315.801, the first year of service of an employee who, like respondent (S. App.), is appointed from the Commission's register of qualified applicants to a career conditional position, is a probationary period. If the agency determines that the employee's conduct during the probationary period fails to show

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[4] The constitutionality of discharging a *permanent* federal employee following compliance with the notice and opportunity to reply requirements of 5 C.F.R. 752.202 but prior to subsequent review of the discharge in full trial-type hearings before the pertinent agency (5 C.F.R. 771.208-771.213) or the Civil Service Commission (5 C.F.R. 772.305) is at issue in *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted, April 2, 1973. Respondent has not challenged in this case the constitutionality of the administrative procedures governing the termination of *probationary* employees.

that he is qualified for continued employment, it may at any time during that period terminate his employment simply by notifying him in writing of the reasons for and the effective date of the termination. 5 C.F.R. 315.804. In the event the termination is based on conduct occurring prior to the probationary period, however, the employee is entitled to advance notice of proposed termination, an opportunity to respond in writing and with supporting affidavits, and notice of any adverse decision on or prior to the effective date of the termination. 5 C.F.R. 315.805.

The probationary employee has only a limited right to appeal his termination. He has no right to an administrative appeal within his agency. See 5 C.F.R. 771.201(b)(4). He may appeal his discharge to the Civil Service Commission, but only on the grounds that his termination (1) was based on discrimination because of race, color, religion, sex, or national origin, (2) was based on political reasons or marital status or allegedly resulted from improper discrimination because of a physical handicap, or (3) was based on preemployment conduct and was not effected in accordance with the applicable procedures for such a termination. 5 C.F.R. 315.806. On such an appeal to the Commission, the probationary employee may submit evidence by affidavit (5 C.F.R. 772.304), but is not entitled to a hearing. See 5 C.F.R. 772.305(a). Finally, like permanent employees, the probationary employee may appeal an adverse initial decision on his appeal to the Commission's Board of Appeals and Review. 5 C.F.R. 772.307. In short, under the appli-

cable regulations, executive agencies may summarily dismiss probationary employees subject only to limited review by the Commission.

If either a permanent or probationary employee unsuccessfully exhausts his administrative remedies, he may obtain limited judicial review of the Commission's final decision in a district court on the basis of the administrative record. The precise scope of that review, however, is a subject of some disagreement among the circuits. See, *e.g.*, *Dozier* v. *United States*, No. 72-3305, C.A. 5, decided February 14, 1973, slip op. 4; *Norton* v. *Macy*, 417 F. 2d 1161, 1164 (C.A. D.C.); *Vigil* v. *Post Office Department*, 406 F.2d 921, 922 (C.A. 10); *Taylor* v. *Civil Service Commission*, 374 F.2d 466, 469-470 (C.A. 9); *Brown* v. *Zuckert*, 349 F.2d 461 (C.A. 7).

2. The administrative scheme described above provides a mechanism for discharged employees to contest their discharges by appeal, but permits the discharges to become effective pending review. In 1948, Congress amended the basic Lloyd-LaFollette Act of 1912 to provide that any person in the "classified civil service" who is discharged and later restored to his job on the ground that his discharge was unjustified is entitled to backpay for the period he was out of work. 62 Stat. 355. In enacting this backpay statute, Congress recognized the continuing authority of the executive to dismiss a federal employee, and merely provided a means for compensating the employee in the event his discharge was overturned on appeal. During the debates on the legislation, the

manager of the bill in the Senate, Senator Langer, commented that the bill (94 Cong. Rec. 6681):

> * * * provides that an agency or department of the Government *may remove any employee at any time*, but that the employee shall then have a right of appeal. When he is removed, he is of course off the payroll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended. [Emphasis supplied.]

In 1966, Congress extended the backpay provisions (now codified in 5 U.S.C. 5596) to cover all wrongfully discharged federal employees, including probationary employees. 80 Stat. 94-95. The purpose of the extension, like the original 1948 provision, was to provide the means whereby all wrongfully discharged employees could be "made whole". S. Rep. No. 1062, 89th Cong., 2d Sess., p. 2; H. Rep. No. 32, 89th Cong., 1st Sess., p. 1.

C. The Action of the District Court in Enjoining Respondent's Discharge is Inconsistent with the Administrative Scheme Governing Federal Employee Discharges

This Court has stated that where Congress

> * * * has enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411, 422. See also *McKart* v. *United States*, 395

U.S. 185, 193-195; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-768. The "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *McKart*, *supra*, 395 U.S. at 193. A primary purpose of the doctrine, of course, is to avoid premature interruption of the administrative process; a closely related purpose is to preserve executive and administrative autonomy. *McKart*, *supra*, 395 U.S. at 193-194. Application of the doctrine also permits administrative agencies to correct errors which may have occurred in administrative proceedings without the need of judicial action.

The court of appeals ruled that the doctrine of exhaustion of administrative remedies has no relevance to this case since the Civil Service Commission has no authority to grant interim injunctive relief and since respondent thus had no administrative remedies to exhaust before applying to the district court for such relief (Pet. App. 6a-8a). The court also emphasized that, in ruling on respondent's request, the district court would not decide the merits of respondent's claim that her discharge was based on preemployment conduct, but only whether there is any likelihood of success on the merits; the role of the Commission in deciding the merits would not, in the court's view, be disturbed (Pet. App. 25a-26a).

We agree with the court of appeals that this case does not present an exhaustion question in the traditional context of deferring judicial consideration of a matter to be decided by an administrative agency.

But the policies underlying the exhaustion doctrine —respect for the administrative process and preservation of executive and administrative autonomy— are implicated here. As in traditional exhaustion cases, the fundamental questions at issue in this case are what is the established administrative scheme and is the relief sanctioned by the court of appeals inconsistent with the scheme. In our view, the enjoining of a probationary employee termination pending review of the termination by the Civil Service Commission is wholly inconsistent with the administrative scheme governing the removal and reinstatement of probationary employees—a scheme which retains the executive's authority summarily to dismiss such employees and provides for backpay as the sole remedy if a dismissal is overturned on review.[5]

As we have noted, this Court has recognized the "settled principle" that in the absence of legislation government employment may be revoked at will. *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 896. By the legislation, executive action and rulemaking described above, this principle has been modified to protect federal employees in various ways from arbitrary adverse action. The protective scheme embodies a balancing of the rights of

[5] We contend here only that the district courts may not enjoin discharges of *federal* employees pending administrative review of their discharges. Whether a *private* employer may be enjoined under certain circumstances from discharging an employee pending the processing by an administrative agency of a complaint challenging the discharge is, of course, a different question.

employees against the legitimate interests of the executive in maintaining an effective civil service.

Thus, permanent employees may be discharged for cause after notice and an opportunity to reply, but before a full evidentiary hearing before the agency or the Civil Service Commission; probationary employees may be terminated summarily with only limited rights to appeal their terminations to the Commission. In neither case did Congress seek to limit further the traditional authority of the executive to discharge federal employees by authorizing the Commission or the courts to enjoin discharges pending completion of administrative review. In fact, Congress has imposed no restraints whatever on terminations of probationary employees other than to require backpay in the event of reinstatement; the limited procedural rights of probationary employees are conferred solely by regulation.

In enacting the Back Pay Act, Congress recognized that the government may remove any employee prior to completion of administrative review of the removal and chose not to limit that authority. Instead, the Act provides the exclusive mechanism for making any discharged employee "whole" in the event his discharge proves to be unwarranted (see pp. 17-18, *supra*). The Act thus complemented the preexisting administrative scheme by providing relief for wrongful discharge where previously no relief had been available.[6]

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[6] If Congress had felt that further relief should be afforded federal employees against summary discharges, it presum-

The decision of the court below seriously disturbs the balance achieved in the administrative scheme between the rights of the employees and the interests of the government. Under the court's decision, probationary employees who have been found to be incompetent, unwilling to accept supervision or otherwise disqualified for further service may, nevertheless, continue in employment with full pay pending review by the Civil Service Commission of their discharges. Such interference with the government's traditional right summarily to discharge probationary employees is inconsistent with the whole concept of a one-year probationary period—a trial period during which summary termination is specifically authorized in the event the employee proves to be unqualified.[7]

The court of appeals attempted to justify its decision on the ground that it was not interfering with the administrative scheme for reviewing discharge disputes, but was only sanctioning interim relief which the Civil Service Commission was powerless to

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ably would have given the Civil Service Commission the administrative authority to stay a discharge on a proper showing pending review of the discharge by the Commission. As the court below recognized, however, the Commission has no such authority (Pet. App. 6a, n. 12).

[7] Under 5 C.F.R. 315.803, an agency

> * * * shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

grant (Pet. App. 6a-7a). Apart from the fact that Congress intended reinstatement and backpay to be the exclusive form of relief from wrongful discharges, this rationale seriously misjudges the impact of the decision on the administrative process.

As we have noted (pp. 16-17, *supra*), the grounds on which probationary employees may appeal their terminations to the Civil Service Commission are sharply limited. In the case of respondent's appeal, the sole issue will be whether her termination was based in whole or in part on preemployment conduct. Moreover, the review procedures before the Commission are summary in nature; respondent may make written submissions, but is not entitled to a hearing. 5 C.F.R. 772.304-772.305. The limited scope and summary nature of administrative review are consonant with the principle that federal agencies have broad discretion in summarily dismissing probationary employees. We are informed by the Civil Service Commission that in fiscal year 1972, some 2,950 probationary employees were released by the federal government. The figure for fiscal 1971 is 4,430.

Under the decision below, probationary employees may obtain review of their discharges in the district courts prior to any action by the Commission by alleging that they will be irreparably injured if discharged pending Commission review, and the district court may hold an evidentiary hearing to determine whether an injunction should issue. In this case, for example, the district court ordered the government to produce a witness to enable the court to resolve the

very issue that is the subject of the respondent's appeal to the Commission—*i.e.*, whether her discharge was based on conduct arising prior to her employment. The court of appeals approved the district court's order, noting that the preferred procedure in considering motions for preliminary injunctions is to take oral testimony on disputed matters of fact (Pet. App. 14a-15a).

Thus, under the theory of preventing irreparable injury or "breathing life into the regulations of the Government agencies" (Pet. App. 15a), the court of appeals has sanctioned preliminary court proceedings far broader in scope than the administrative proceedings sought to be protected. That the district court's decision is not a determination "of the merits" but only of whether there is any "likelihood of success on the merits" (Pet. App. 26a), does not negate the fact that the district court is inquiring into the very matter reserved under the administrative scheme for consideration by the Commission. While the Commission may not be bound by the district court's ruling on the likelihood of success, it can hardly fail to take notice of and be influenced by the district court proceedings. Thus, to a significant degree, the court of appeals has preempted the authority of the Civil Service Commission to resolve personnel disputes in the first instance. As the Third Circuit explained in *American Federation of Government Employees* v. *Resor*, 442 F.2d 993, 994, in refusing to enjoin the discharge of federal employees prior to the exhaustion of remedies before the Civil Service Commission:

> For the courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question regarding the doctrine of the separation of powers, and in any event would violate a congressional decision that the present controversy be initially considered by the Civil Service Commission.[8]

Consideration of the traditional role of the courts in federal personnel cases provides a further indication of the damaging effect of the decision below on the administrative process. Judicial review of Civil Service Commission decisions is limited and confined to the administrative record (see cases cited at p. 17, *supra*). The resolution by a district court of a motion for interim relief, on the other hand, may well involve a trial of disputed factual issues. Thus, under the decision below, not only are the courts interjected into personnel cases prematurely, they are interjected in a context that requires them to play a much greater role in the resolution of the factual issues underlying the cases than they would play in the exercise of their normal judicial review function.

The court of appeals' conclusion (Pet. App. 25a) that its decision involves only a limited principle and

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[8] *Schwartz* v. *Covington*, 341 F.2d 537 (C.A. 9), is the only employee discharge case which arguably supports the decision below. In *Schwartz*, a stay of plaintiff's discharge from the armed forces was granted pending review of the discharge by the Army Board for Correction of Military Records. As the dissenting judge below observed (Pet. App. 32a-33a), however, the majority's reliance on that decision is misplaced, since review by the Board has not been deemed a part of the administrative process. See *e.g.*, *Ogden* v. *Zuckert*, 298 F.2d 312 (C.A. D.C.).

will be invoked only in rare instances is dubious. Many, if not all, discharged federal employees could make allegations similar to respondent's of irreparable injury from loss of wages, the presence of charges on her record, and embarrassment. Such injuries would appear to be inevitable incidents of any discharge. Moreover, on the merits, respondent contests her discharge on a relatively routine procedural ground. In short, the decision below threatens to disrupt pervasively the summary procedures for discharging federal probationary employees found unfit for further service.

Nor is the impact of the decision below necessarily confined to the discharge of probationary employees. As we have noted, permanent civil service employees may be discharged for cause prior to administrative evidentiary hearings on their discharges. They too will be encouraged by the decision below to seek to enjoin their discharges pending completion of the hearings and the administrative review process on the ground that they will be irreparably injured by the loss of wages notwithstanding the awarding of backpay in the event their discharges are overturned. The effect of the court of appeals' ruling, if allowed to stand, will be to add a new and unwarranted tier of litigation in federal personnel cases.

D. This Case Does Not Involve The Traditional Power of the Courts to Grant Equitable Relief to Preserve Their Jurisdiction or Make Judicial Review Meaningful

In ruling that the temporary enjoining of federal employee discharges pending administrative review

was within the district courts' traditional equity powers, the court of appeals (Pet. App. 8a-10a) relied heavily on this Court's decisions in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, and *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. Neither case supports the ruling below.

In *Scripps-Howard*, the Federal Communications Commission had granted a radio broadcast licensee a construction permit to change its broadcast frequency and increase its transmission power. Claiming that the changes would interfere with its operations and that the Commission could not lawfully grant the permit without a hearing, another licensee sought judicial review in the court of appeals and a stay of the Commission's action pending that review. On certificate from the court of appeals, this Court held that the court of appeals could stay the effectiveness of the Commission's order pending judicial review. The Court noted that federal courts traditionally could stay the enforcement of a judgment pending the outcome of an appeal and that this power was conferred by the All Writs Act.* 316 U.S. at 10, n. 4. The Court reviewed the Communications Act of 1934 and found no basis for concluding that Congress had intended to deprive the courts of appeals, in reviewing Federal Communication Commission

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* Now codified at 28 U.S.C. 1651(a), which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

orders, of their conventional power to stay the enforcement of orders pending completion of judicial review. 316 U.S. at 11-17.

In *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, the Court again relied on the All Writs Act in holding that a court of appeals had jurisdiction to issue a preliminary injunction to prevent consummation of a merger then under attack before the Federal Trade Commission as violative of Section 7 of the Clayton Act, 15 U.S.C. 18. The Court noted that the court of appeals has exclusive jurisdiction under Section 11(c) of the Clayton Act, 15 U.S.C. 21(c), to review final Commission orders and that this grant of jurisdiction includes the "traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." 384 U.S. at 604.

In both *Scripps-Howard* and *Dean Foods*, the Court reaffirmed the courts of appeals' power under the All Writs Act to issue injunctions "in aid of their respective jurisdictions." 28 U.S.C. 1651(a). In *Scripps-Howard*, an appeal from a final order of the Federal Communications Commission was pending before the court of appeals and a stay of the order was necessary to prevent irreparable injury pending the resolution of the appeal; in *Dean Foods*, injunctive relief was necessary in order to permit effective administrative review of an imminent merger and allow for appellate review of the administrative agency's decision. In both cases, a stay by the court of

appeals was directly related to the immediate or potential exercise of the court's appellate jurisdiction and was appropriate to protect that jurisdiction.

In this case, however, the temporary enjoining of respondent's termination by the district court was not necessary to protect the potential exercise of the district court's jurisdiction to review the decision of the Civil Service Commission on respondent's appeal. The immediate discharge of respondent would in no way limit the court's authority fully to review her discharge after the Civil Service Commission decides her appeal, or prevent it from fully providing all the relief that Congress has authorized in this situation —reinstatement and backpay. The district court's order thus was not "in aid of [its] * * * jurisdiction" and was not authorized by the All Writs Act.

Finally, in *Scripps-Howard* and *Dean Foods*, the Court noted that in the relevant regulatory statutes Congress had been silent with respect to the power of the courts to grant interim equitable relief pending judicial review and that there was no reason to infer from that silence that Congress meant to cut back on the courts' traditional equity powers. Neither case involved any inconsistency between the administrative schemes established by Congress and the granting of equitable relief by the courts pending judicial review. In this case, by contrast, the administrative scheme (including the Back Pay Act) governing the removal and reinstatement of federal employees is wholly inconsistent with the enjoining of employee discharges pending administrative review. In enact-

ing the Back Pay Act, Congress provided the e exclu-
sive remedy for loss of pay due to wrongful dis scharge.

Although not discussed by the courts below, we also
point out that Section 10(d) of the Admini istrative
Procedure Act, 5 U.S.C. 705, does not confe r juris-
diction on the district courts to enjoin fede ral em-
ployee discharges pending administrative review.
Section 10(d) provides in relevant part that

> * * * to the extent necessary to prevent i irrepar-
> able injury, the reviewing court * * * ma ay issue
> all necessary and appropriate process to p postpone
> the effective date of an agency action or to pre-
> serve status or rights pending conclusion n of the
> review proceedings.

The legislative history of Section 10(d) in ndicates
that it was intended "to provide intermedia te judi-
cial relief * * * in order to make judicial review
effective" (S. Rep. No. 752, 79th Cong., 1st Sess., p.
27) and, with one exception not relevant he ere, re-
flected existing law under *Scripps-Howard* (id. at 44
(appendix to statement of Attorney General Tom C.
Clark)). Thus, since *Scripps-Howard* and its progeny
do not confer jurisdiction on the district court t in this
case, neither does Section 10(d) of the Adm inistra-
tive Procedure Act. Moreover, the Attorney G eneral's
Manual on the Administrative Procedure Act (1947)[10]
states (p. 106):

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[10] The Manual was compiled after the Act becam ne law to
guide federal agencies in adjusting their procedure es to the
requirements of the Act (Manual, p. 6).

> The "reviewing court" in which section 10(d) vests the power to stay agency action is the court, and only that court, which has obtained jurisdiction to review the final agency action * * *. Section 10(d) confers no power upon a court in advance of the submission to it of final agency action for review on the merits. See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383 (1938).

In this case, the Civil Service Commission has not yet ruled on respondent's appeal and no final agency action is pending before any "reviewing court."

Finally, even if Section 10(d) conferred jurisdiction on the district court to consider respondent's claim for interim relief, her suit should have been dismissed since the temporary loss of pay, the presence of charges on her record, and embarrassment pending review by the Civil Service Commission of a federal employee's discharge is not—assuming backpay will be awarded and reinstatement ordered in the event the discharge is overturned—the type of "irreparable injury" contemplated by Section 10(d) as justifying interim equitable relief. See *Wettre* v. *Hague*, 74 F. Supp. 396, 400-401 (D. Mass.), vacated and remanded on other grounds, 168 F.2d 825 (C.A. 1). For a discussion of Section 10(d), see Jaffe, *Judicial Control of Administrative Action*, pp. 659-662, 667-672 (1965).

In short, the federal courts have never enjoyed traditional equitable powers to enjoin federal employee discharges (see *White* v. *Berry*, 171 U.S. 366); the enjoining of employee discharges pending an ad-

ministrative appeal to the Civil Service Commission is not authorized by the All Writs Act or the Administrative Procedure Act and is wholly inconsistent with the administrative scheme established to protect civil service employees.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-403

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, *et al.*,

Petitioners,

—v.—

JEANNE M. MURRAY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

Whether, in an appropriate case, a federal district court has jurisdiction to grant interlocutory relief pending an adjudication by the Civil Service Commission.

Statement

At the close of business on Thursday, May 20, 1971, Respondent, Mrs. Jeanne M. Murray was handed a letter from Mr. W. H. Sanders, then Acting Commissioner of the Public Buildings Service, stating that her employment as a probationary program analyst with the General Services

Administration ("GSA") would be terminated the following Friday for failure to follow office procedures and to accept direction.[1] Mrs. Murray had been given no prior notice, formal or informal, of any charges against her, nor any opportunity to rebut them. Her job performance had, in fact, been rated as satisfactory only the previous month.[2]

The following Tuesday, Mrs. Murray's counsel met with a GSA personnel officer, Mr. Stan Maher, to discuss her termination. They requested specifics on the charges against her and an opportunity to reply. Mr. Maher showed counsel portions of a memorandum setting forth the basis for Mrs. Murray's termination and took the request for a hearing under advisement.[3]

The memorandum set out the basis for the allegations set forth in Mr. Sanders' letter and referred at length to Mrs. Murray's alleged parallel conduct while employed at the Defense Intelligence Agency ("DIA").[4] Mrs. Murray had good reason to believe that her record at DIA was excellent.[5] That afternoon, Mrs. Murray's counsel sent a letter to Mr. Maher calling his attention to 5 C.F.R. 315.805, which prohibits the termination of a probationary employee "based in whole or in part" on prior conduct, without benefit of a statement of charges and "bona fide consideration" of her reply.[6]

The afternoon before her termination was to occur, the GSA informed Mrs. Murray's counsel that she would not

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[1] App., pp. 25-26.

[2] *Id.* at 27.

[3] *Id.* at 7-8.

[4] 8. App.

[5] App. at 6, ¶ 4.

[6] *Id.* at 10-11.

be given a hearing and could not have a copy of the adverse memorandum. Counsel immediately telephoned the Civil Service Commission to determine whether Mrs. Murray's appeal could be expedited in view of her imminent termination. They were informed that the Commission's case load would not permit such a procedure.[7]

The following morning, Mrs. Murray formally appealed to the Commission.[8] Simultaneously, she brought suit in district court seeking a stay of her discharge pending the Commission's decision. The court, Judge Gasch presiding, issued a temporary restraining order until a hearing could be held on her motion for a preliminary injunction.[9]

At the hearing on Mrs. Murray's motion for a preliminary injunction, counsel for the government offered to produce Mr. Sanders' affidavit that, in making the decision to terminate Mrs. Murray, he had not considered the allegations regarding her service at DIA in whole or in part.[10] Judge Gasch, finding the proffered evidence unlikely on its face, insisted on Mr. Sanders' live testimony on this point.[11] Thereupon, the hearing was adjourned until Mr. Sanders would appear and the TRO was continued until the hearing could be completed.[12] Judge Gasch was later advised that the government refused to produce Mr. Sanders.[13] For this reason, the hearing on the preliminary injunction was never completed.

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[7] *Id.* at 8.

[8] *Id.* at 19-24.

[9] *Id.* at 33.

[10] *Id.* at 38.

[11] *Id.* at 41-42.

[12] *Id.* at 43.

[13] Petitioner's Brief on Petition for Writ of Certiorari, App. F., p. 42a.

The government appealed, contending that the court lacked jurisdiction to enjoin the discharge and that the court erred in requiring Mr. Sanders' evidence to be presented in the form of live testimony.

At oral argument before the court of appeals, the government advised the court that the Civil Service Commission had been instructed to withhold processing of Mrs. Murray's appeal in order to avoid mooting this case.

The court of appeals affirmed the district court's decision that it had jurisdiction to enjoin Mrs. Murray's discharge pending review by the Commission.[14] Noting that its jurisdictional holding was limited to "the propriety of the [District] Court's granting interim injunctive relief pending an administrative determination on the merits," 462 F.2d 871, 874, the court of appeals stressed that, since the hearing was never completed, neither the validity of the dismissal nor the question of irreparable harm had been litigated in the district court. The court of appeals then stated:

> "Without intimating in any manner which way [these issues] should be decided, it is probable that only in a small percentage of cases would the complaining employee be able to establish the grounds for a temporary injunction—assuming that executive agencies conscientiously follow their own rules of due process. But here the complaining employee alleges that the agency has violated its own rules, has not accorded her the required hearing, and is in the process of discharging her unlawfully. She does not ask the trial court to rule on the *merits* of her discharge; the agency may have ample grounds, but it must follow procedural due proc-

[14] The court of appeals also approved of Judge Gasch's right, under Rule 43(e), F. R. Civ. P., to require oral testimony from Mr. Sanders in lieu of the proffered affidavit. 462 F.2d 871, 878-79. The court was apparently unanimous on this aspect of the case, and petitioner has abandoned the issue before this Court.

ess to establish them. To hold that the District Court has no jurisdiction on the basis of these allegations to grant the temporary relief requested, would be tantamount to holding that the District Court *never* would have jurisdiction." *Id.* at 879-80.

Summary of Argument

The procedural posture of this case is somewhat unusual. The record of the hearing on Mrs. Murray's motion for a Temporary Restraining Order, issued on June 4, 1971, is not before the Court; nor did the government seek appellate review of that Order. The Temporary Restraining Order was continued until a hearing on Mrs. Murray's motion for Preliminary Injunction could be completed. That hearing was never completed because the government refused to produce Mr. Sanders for live testimony. The government has abandoned before this Court any claim that it was entitled to withhold Mr. Sanders' testimony.

In sum, the government aborted the hearing below before it could be completed. As a result, Mrs. Murray was never afforded an opportunity to face—or Judge Gasch to pass on—the question of whether the threatened injury to her is sufficiently unique to merit the extraordinary relief sought. The court of appeals repeatedly stated that Mrs. Murray will have to meet this burden when the hearing resumes.

Under these circumstances, the government's cavalier characterization of this case as "routine" is premature on the present record. If it should appear at the hearing that Mrs. Murray's case is truly routine, Judge Gasch will rule accordingly. At issue here is whether *any* possible showing on her part could justify the relief sought.

1. As the court of appeals held, this case does not involve the doctrine of exhaustion of administrative remedies. That

doctrine, as petitioner now concedes, acts to preserve the agency's right to make a final determination on the merits and does not prevent the issuance of injunctive relief which merely preserves the *status quo* pending administrative appeal. Petitioner's general exposition on the limited role of the courts in civil service appeals is, therefore, irrelevant.

2. Nor does this case involve the related issues of irreparable harm or the underlying merits of respondent's claim. Petitioner's refusal to proceed with the hearing leaves these questions to the trial court.

3. Petitioner's fundamental contention—that no federal court can ever enjoin a civil service discharge in order to preserve its ultimate jurisdiction—is invalid. The federal courts have repeatedly invoked their traditional equity powers, as embodied in the All Writs Act, 28 U.S.C. 1651(a), to preserve the *status quo* pending administrative appeal. This practice was endorsed by this Court in *F.T.C.* v. *Dean Foods*, 384 U.S. 597 (1966). There are, in fact, at least two cases in which injunctions were issued against the discharge of a federal employee. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D. N.Y. 1950).

4. There is nothing in the "administrative scheme" of the civil service laws to preclude such use of the All Writs Act. In issuing the injunction in this case, the courts below were not challenging any part of the civil service law; rather, they were attempting to preserve the *status quo*, so that the Civil Service Commission might effectively uphold a specific procedural requirement of that law.

Moreover, in view of the repeated statements of this and other courts that the All Writs Act cannot be curtailed by mere implication, the narrow legislative histories of the Back Pay Acts of 1948 and 1966 cannot be said to preclude the type of relief granted in this case. There is, in fact, clear evidence that Congress never intended those Acts to preclude other forms of relief.

5. Petitioner's reliance on the Attorney General's 1948 view that Section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705, does not, in and of itself, vest courts with injunctive power until an appeal is pending may well be misplaced. But even assuming, *arguendo*, that that interpretation is correct, the injunctive power of courts reviewing administrative decisions as provided by Section 10(d) is certainly consistent with, and at times may be dependent upon, prior interim relief as granted in this case under the All Writs Act.

Such interim relief is also consistent with the 1972 extension of Title VII of the 1964 Civil Rights Act to federal employees. 42 U.S.C. § 2000e-16. Indeed, if one accepts petitioner's theory that no federal court can ever grant interlocutory relief in a federal employee discharge case, he is forced to the conclusion that, despite the clear intent of the recent amendment to Title VII, federal employees have fewer rights under that Act than private employees.

6. Given the stringent requirements for any injunctive relief, the remedy at issue here will probably be invoked very sparingly. However, the fundamental jurisdictional question in this case is of critical importance for the general administration of the civil service laws and for the jurisdictional integrity of the federal courts.

ARGUMENT

I.

As the Court of Appeals emphasized, this case involves neither a determination on the merits nor an adverse construction of civil service law, and the precedents cited by petitioner regarding judicial deference toward civil service determination are, therefore, irrelevant.

Though petitioner at last agrees that, "this case does not present an exhaustion question in the traditional context of deferring judicial consideration of a matter to be decided by an administrative agency" (Petitioner's Brief, p. 19), it continues to argue that the judiciary has limited jurisdiction over civil service determinations which may not be invoked until the employee has exhausted his administrative appeals. Petitioner's Brief, pp. 10-13, 17, 18-20. While these general observations are correct, it is equally clear, as the court of appeals held, that such considerations are not relevant where the employee is seeking not a determination on the merits but only a temporary stay pending administrative and judicial review. As the court stated:

> "It is important to specify exactly what legal issue confronts us. *We are here concerned with the propriety of the court's granting interim injunctive relief pending an administrative determination on the merits,* when there is no statutory provision specifically authorizing such relief. In the past this issue has been confused with the related, but quite distinct, issue of the necessity for the exhaustion of administrative remedies before an adjudication on the merits may be obtained in a court. This error stems from the failure to recog-

nize that *what is sought in actions such as the case at bar is not a determination on the merits that will be binding upon the administrative agency before that agency has had its chance to complete its procedures for such a determination, but is simply an interim form of relief to prevent irreparable damage to the parties or to the public interest while the final outcome of the administrative determination is uncertain. Such interim relief is not the interference with agency actions which the exhaustion of remedies doctrine seeks to prevent, but instead often serves as an aid to the administrative process, since by preserving the status quo it ensures that the final administrative determination will not be undermined or rendered ineffective by by hasty or incorrect procedures at an earlier stage."* 462 F.2d 871, 874-75 (Emphasis supplied).

For a further discussion of this distinction, see *L. Jaffe, Judicial Control of Administrative Action* 669-71 (1965); Comment, *Interim Injunctive Relief Pending Administrative Determination*, 49 *Col. L. Rev.* 1124, 1127-28 (1949).

However, while it is clear that the exhaustion doctrine is not applicable in this case, petitioner's argument by analogy (Petitioner's Brief, p. 20) does merit some consideration. First, it must be remembered that the court of appeals found that Mrs. Murray has conscientiously pursued her administrative appeal. 462 F.2d 871, 873. In this regard, the court stressed that the Civil Service Commission had no power to stay her discharge. *Id.* This is not, therefore, a case where an employee has gone to the courts for relief which the agency could have granted but refused to do so. Respondent pursued her administrative remedies as fast and as far as she could; and she will continue to do so under a temporary court order that merely preserves the *status quo* pending her administrative appeal.

Similarly, it was the government, and not Mrs. Murray, who created whatever delay has ensued in this case. Indeed, Judge Gasch did not even issue his opinion until he was informed that the government had no intention of either producing the one witness who could clarify the reasons for the discharge or granting Mrs. Murray her rights under the civil service regulations. Given such a record, it seems rather incongruous for petitioner to suggest that an affirmance in this case will necessarily prolong civil service determinations.

Finally, it should be noted that the very precedent cited by petitioner to support its exhaustion theory, states that,

> "To be sure, as with most general rules of decision, there are exceptions. Thus, if the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury, or when there is a clear and unambiguous statutory violation, then a court need not defer decision until the conclusion of the administrative inquiry. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752 at 773, 67 S. Ct. 1493; *Fitzpatrick* v. *Snyder,* 220 F.2d 522, 525 (1st Cir. 1955), *cert. denied* 349 U.S. 946, 75 S. Ct. 875, 99 L. Ed. 1272; *Wettre* v. *Hague,* 168 F.2d 825 (1st Cir. 1952). *Shargel* v. *Hollis,* 120 F. Supp. 814 (S.D.N.Y. 1954); *Reeber* v. *Rossell,* 91 F. Supp. 108 (S.D.N.Y. 1950)."

American Federation of Government Employees v. *Resor,* 442 F.2d 993, 994-95 (3rd Cir. 1971).

It seems strange to argue that where irreparable injury is likely a court may ignore the administrative process entirely and decide the case immediately, but that it may not —when faced with the same probability of irreparable harm —take the less intrusive action of preserving the *status quo* pending an administrative hearing on the merits. Thus, as

a matter of law, policy and logical consistency, the exhaustion doctrine in no way bars judicial preservation of the *status quo* pending an administrative appeal.

II.

As the Court of Appeals also emphasized, this case does not turn on either the question of irreparable injury or the validity of respondent's underlying claim.

The government's refusal to produce Mr. Sanders precludes it from raising the related issues of irreparable harm or the underlying merits of respondent's claim. As the court of appeals emphasized, these questions remain for the trial court to determine. 462 F.2d 871, 877-78, 879-80. By refusing to proceed with the hearing, the government has conceded the likelihood of both ultimate success on the merits and irreparable harm.[13] Such questions are not, therefore, before this Court. The only question here is the jurisdiction of the federal courts to enjoin a civil service discharge, *assuming that the employee has shown he is likely to prevail on the merits and to suffer irreparable injury.*

[13] Respondent has, however, consistently offered to show unique circumstances proving irreparable harm. Reply Brief for Jeanne M. Murray, p. 7 n.4.

III.

Petitioner's principal contention—that no court can ever enjoin a civil service discharge to preserve its jurisdiction—is incorrect.

Courts of equity have granted injunctive relief maintaining the *status quo* pending agency determinations since the inception of the modern administrative process. In early cases, involving administrative determinations of land titles, injunctions were uniformly issued to restrain waste pending the agency's decision.[16] With the growth and development of the administrative process, injunctive relief has been granted in a variety of contexts at the instance of both aggrieved individuals[17] and the agencies themselves.[18]

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[16] *Olive Land & Development Co.* v. *Olmstead*, 103 F. 568 (C. C. S.D. Cal. 1900); *Northern Pacific Co.* v. *Soderburg*, 86 F. 49 (C. C. N.D. Wash. 1898); *Elliott* v. *Rich*, 24 N.M. 52, 172 P. 194 (1918).

[17] *Smith* v. *Resor*, 406 F.2d 141 (2d Cir. 1969) [Induction of army reservist stayed pending military review proceedings]; *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965) [Soldier's discharge enjoined pending action by Discharge Review Board]; *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F.2d 775 (2d Cir. 1948) [Rate reduction enjoined pending decision by Maritime Commission]; *Crown Zellerbach Corp.* v. *Wirtz*, 281 F. Supp. 337 (D.D.C. 1968) [Secretary of Labor enjoined from barring manufacturer from government contracts pending an administrative hearing on employment discrimination charges]; *Pennsylvania Motor Truck Ass'n.* v. *Port of Philadelphia Marine Terminal Assn.*, 183 F. Supp. 910 (E.D. Pa. 1960) [Pier operator's truck loading practice enjoined pending decision by Maritime Board); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) [Discharge of federal employee enjoined pending review by Civil Service Commission]; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D.N.Y. 1948), *appeal dismissed*, 336 U.S. 941 (1949) [Implementation of rate agreements enjoined pending review by Maritime Commission]; see generally, Comment, *Interim Injunctive Relief Pending Administration Determination*, 49 *Colum. L. Rev.* 1124 (1949); Note, *Human Relations Commissions*, 74 Yale L. J. 1171, 1199 n.141 (1965); L. Jaffe, *Judicial Control of Administrative Action*, pp. 662-86 (1965).

[18] *F.T.C.* v. *Dean Foods Co.*, 384 U.S. 597 (1966) [Merger enjoined pending FTC decision]; *Public Utilities Commission* v.

In *F.T.C.* v. *Dean Foods*, 384 U.S. 597 (1966), this Court explicitly upheld this practice of preserving the *status quo* pending administrative review.[19] Rejecting arguments that Congress had *implicitly* curtailed the court's traditional equitable powers embodied in the All Writs Act (28 U.S.C. § 1651(a)), this Court held that without some *explicit* congressional enactment to the contrary, the courts retain their authority to issue appropriate injunctions to preserve the jurisdiction of both the administrative agencies and the courts of review. *Id.* at p. 608.

Such authority has, in fact, been invoked at least twice before to stay the discharge of a federal employee. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) (Kaufman, J.), *Cf. Group* v. *Finletter*, 108 F. Supp. 327 (D.D.C. 1952) (enjoining the demotion of a federal employee pending both administrative and judicial review). And only recently, the Fifth Circuit held that the courts can grant such injunctive relief in the related context of a private employee appealing a discharge to the Equal Employment Opportunities Commission. *Drew* v. *Liberty Mutual Insurance Co.*, CCH Emp. Prac. Guide ¶ 8652 (5th Cir. June 4, 1973).

Petitioner ignores *Reeber* completely. This is particularly unfortunate in view of the government's contention that sixteen years after *Reeber*, Congress—without any

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Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954) [Rate increase enjoined pending decision by P.U.C.]; *Board of Governors, etc.* v. *Transamerica Corp.*, 184 F.2d 311 (9th Cir. 1950), *cert. den.* 340 U.S. 883 (1950) [Bank merger enjoined to preserve jurisdiction of the Federal Reserve Board].

[19] *See also, Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963); *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942).

mention of it or any other treatment of this issue—eliminated the courts' injunctive powers in civil service cases.[20]

Petitioner attempts to avoid *Schwartz* by arguing that a different circuit has held that the agency involved—the Army Board for Correction of Military Records—is not part of the administrative process. Petitioner's Brief, p. 25 n.8; *Ogden* v. *Zuckert*, 298 F.2d 312 (D.C. Cir. 1961). *But see, Sohm* v. *Fowler*, 365 F.2d 915 (D.C. Cir. 1966) (limiting *Ogden*); *Nelson* v. *Miller*, 373 F.2d 474, 479-81 (3rd Cir. 1967), *cert. denied* 387 U.S. 924 (1967) [stating that *Schwartz* was correct in holding that a court could enjoin a discharge under certain circumstances prior to review by the military boards, but that despite *Ogden*, even a court granting interim relief should give the military boards the first chance to pass on the merits of the dispute].

However, as the court of appeals held, such a distinction is merely another attempt to inject the inapplicable exhaustion doctrine into this case:

". . . Whatever the correctness of the *Ogden* court majority (see the closely reasoned dissent by the then

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[20] In his dissent, Judge Robb attempted to distinguish *Reeber* on the grounds that the Back Pay Act of 1948 would not have applied to the plaintiffs in that case, 462 F.2d 871, 882 n.1. In view of the fact that the plaintiffs in *Reeber* were disabled veterans (91 F. Supp. 108, 110), Judge Robb's conclusion that the Act would not apply seems highly questionable. See 62 Stat. 354 (1948); 39 Comp. Gen. 639, 641 (March 14, 1960); *U.S. Code, Cong. & Adm. News* (1966), p. 2098 (reprinting the Senate Report on 1966 Back Pay Act which states that the 1948 Act, in conjunction with the Veteran's Preference Act of 1944 authorized back pay awards to veterans separated in reductions in force).

However, even assuming *arguendo* that the Act did not apply to the plaintiffs in *Reeber*, the availability of such relief goes only to the question of irreparable harm and not to the courts' basic jurisdiction to grant injunctive relief. In this regard, it is instructive to note that Judge Kaufman—writing only two years after the 1948 Act—never mentioned the possibility that the Act deprived him of jurisdiction.

Judge Burger), the holding in that case has no application to our reliance on *Schwartz*.

The Ninth Circuit was concerned in *Schwartz* solely with the question of the propriety of granting interim relief. The opinion did *not* pass *either* on the merits *or* on the application or nonapplication of the doctrine of exhaustion of administrative remedies; it *assumed* that the doctrine did apply, and simply granted interim relief pending the final administrative determination. In *Ogden*, on the other hand, this court held that the exhaustion doctrine *did not apply*, because the matter had achieved sufficient administrative finality . . . . In other words, in *Ogden*, unlike *Schwartz*, the question *was* the application or nonapplication of the doctrine of the exhaustion of administrative remedies.

Murray v. *Kunzig* is a case like *Schwartz* v. *Covington*. We are not concerned with the application or nonapplication of the doctrine of exhaustion of administrative remedies, but simply with the propriety of the District Court's exercise of its traditional equity powers to grant interim relief." 462 F.2d 871, 885. (Emphasis in original.) *Accord: Nelson* v. *Miller*, 373 F.2d 474, 479-81 (3rd Cir. 1967), *cert. den.* 387 U.S. 924 (1967).

Indeed, as the court of appeals found, public employee discharges may well force the courts to act in order to preserve their jurisdiction. They must first insure that the employee will be able to invoke the primary jurisdiction of the Civil Service Commission. Preserving the effectiveness of such initial administrative review was, of course, the basis of this Court's opinion in *Dean Foods*. 384 U.S. 597, 603-605 (1966).

The government seeks to distinguish *Dean Foods* on the theory that it "reaffirmed the courts of appeals' power under the All Writs Act to issue injunctions 'in aid of their respective jurisdictions.'" (Pet. Br., at 28) The Act

is by no means confined to courts of appeals. Rather, it happened that a court of appeals is the initial judicial forum for review of actions by the Federal Trade Commission. 15 U.S.C. § 21(c). In this case, initial judicial review is clearly committed to the district courts.

The type of injunction at issue here preserves the potential jurisdiction of any court which has authority to review the administrative determination. This Court has repeatedly held that such relief may be granted prior to judicial appeal. *F.T.C.* v. *Dean Foods,* 384 U.S. 597, 603-04 (1966); *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21, 25 (1943); *Ex Parte United States,* 287 U.S. 241, 246 (1932); *McClellan* v. *Carland,* 217 U.S. 268, 280 (1910). And as petitioner concedes, it is now beyond question that the federal courts do have ultimate jurisdiction over civil service appeals. Petitioner's Brief, p. 17. *See also,* 5 U.S.C. § 702; *Lodge 1858, Am. Fed. of Gov. Emp.* v. *Paine,* 436 F.2d 882, 893, n.69 (D.C. Cir. 1970); *Charlton* v. *United States,* 412 F.2d 390, 394 (3rd Cir. 1969); Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions,* 57 *Corn. L. Rev.* 178 (1971).

Finally, while it must be remembered that neither the question of irreparable injury nor of the necessity for an injunction to preserve jurisdiction[21] are before this Court, it should be noted that the same Back Pay Act emphasized by petitioner suggests a further reason why the courts may

[21] In its brief, petitoner now contends that the district court erred in finding that an injunction was necessary to preserve its jurisdiction, and that therefore the injunction was not authorized by the All Writs Act. Pet. Brief p. 29. Given the facts that the government offered absolutely no assurance that respondent's administrative appeal would be processed promptly and that it never permitted respondent to prove her claim that she would be irreparably harmed in the indeterminate interim, petitioner's attempt to

be forced to enjoin discharges in order to insure both administrative and judicial review. If the employee is discharged pending appeal and is unable to obtain interim employment—something which seems likely following an unjustified discharge—he may find it so difficult to provide for himself and his family that he will be unable to pursue his administrative and legal remedies. Thus in some instances, the Act will make administrative and judicial appeal worthless. In that event, both sound judicial and personnel administration suggest that, *assuming* proof of a likelihood of irreparable harm and of success on the merits, civil service discharges are an appropriate context for exercise of the preservation power embodied in the All Writs Act.

Such cases will be, as the court of appeals emphasized, quite rare. The traditional equitable requirements for interim relief[22] serve as an extremely effective screen. The petitioner without a strong case that his discharge was unlawful must be dismissed out of hand. Those unable to show unique and irreparable injury are also quickly out of court. In cases where the government has a compelling

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raise this factual question at this late stage is questionable on its face.

On the law, the government contends that since the court could have subsequently ordered reinstatement and back pay, the "immediate discharge of respondent would in no way limit the court's authority fully to review her discharge." *Id.* This conclusion is by no means compelled. Unless respondent is in a position to pursue her administrative and legal appeals, no court will ever hear her case. Moreover, a vital part of any court's jurisdiction is the power to frame a fully effective order following its decision. *See, Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923). The very concept of irreparable harm assumes that in certain exceptional cases, delayed relief will not be fully effective.

[22] *See e.g., Virginia Petroleum Jobbers Assn.* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958).

interest in immediate dismissal, such as those involving security matters,[23] relief must also be denied.[24] Experience in the District of Columbia since this case was decided confirms that the traditional equitable tests have been extremely effective in avoiding the non-meritorious claims. A holding that the courts lack jurisdiction to issue interim relief on any possible state of facts would serve no purpose other than to bar the handful of highly meritorious cases.

IV.

There is nothing in the "administrative scheme" which precludes such use of the All Writs Act.

Petitioner's contention that the "administrative scheme" of the civil service laws implicitly precludes judicial action under the All Writs Act ignores the clear doctrine of this and other courts that such jurisdiction may be curtailed *only* by an explicit enactment of Congress. *F.T.C.* v. *Dean Foods*, 384 U.S. 597, 608-12 (1966); *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 11-15 (1942); *Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 259 F.2d 921, 924 (D.C. Cir. 1958).

At the outset, it must be emphasized that Mrs. Murray is in no way challenging existing civil service law or regulations. Petitioner's summary on the limited rights of probationary employees (Petitioner's Brief, pp. 15-17) is simply irrelevant, since, as petitioner concedes, if the discharge at issue

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[23] *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961).

[24] *See, Scarpa* v. *Smith*, 294 F. Supp. 13 (S.D.N.Y. 1968).

> "was in fact based in whole or in part on conduct occurring prior to her appointment by the General Services Administration, [respondent] was entitled under 5 C.F.R. 315.805 to additional procedural rights. Those rights include advance notice of the proposed action against her, an opportunity to reply in writing and with supporting affidavits, and notice of an adverse agency decision on or before its effective date." Petitioner's Brief, p. 4.

Since the government was unwilling to dispute Mrs. Murray's claim that her discharge was in fact based on such prior conduct, the two courts below had to assume that far from contradicting the civil service law, they were upholding it.

Petitioner is thus forced to contend that Congress, in enacting the Back Pay Acts of 1948 and 1966, intended to preclude interim relief under the All Writs Act. Given the clear disapproval of repeals by implication noted above, it should first be stressed that not one word in these acts suggests any limitation of the courts' jurisdiction. 5 U.S.C. § 5596. By contrast, it is clear that when Congress does desire to curtail the injunctive powers of the courts, it is quite capable of expressing that intent in explicit legislation.[25]

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[25] *See, e.g.*, 15 U.S.C. § 634(b)(1) [Providing that no injunction may be issued against the administrator of the Small Business Administration]; 28 U.S.C. § 1341 [Prohibiting injunctions in state tax cases where "a plain, speedy and efficient remedy may be had in the courts of such state"]; 28 U.S.C. § 1342 [Prohibiting injunctions in certain state cases]; 28 U.S.C. § 2281 [Limiting injunctions against the enforcement of state statutes to three-judge courts]; 28 U.S.C. § 2282 [Limiting injunctions against the enforcement of federal statutes to three-judge courts]; 28 U.S.C. § 2283 [Limiting injunctions of state court proceedings to certain circumstances including "where necessary in aid of [the federal court's] jurisdiction"].

In both *Scripps-Howard* and *Dean Foods* this Court noted rather more substantial political histories regarding the proper means of enforcing the F.C.C. and F.T.C. Acts, and held, however, that congressional silences, and inferences derived from them, could not curtail judicial action under the All Writs Act. *Scripps-Howard* v. *F.C.C.*, 316 U.S. 4, 11-13 (1942); *F.T.C.* v. *Dean Foods*, 384 U.S. 597, 600. See also, *id.* at 612-13 (Fortas, J. dissenting).

By contrast, petitioner is unable to cite any consideration of the judicial role in civil service determinations in the history of the Back Pay Acts. Indeed that history is replete with statements that the two acts were nothing more than authorizations of back pay for wrongfully discharged employees.

The Senate Report accompanying the original version of the 1948 Act is representative of this narrow legislative focus. It states that the inability of the Civil Service Commission to award back pay was a "loophole" that needed correction, and that the bill in question, "merely acts to afford the members of the classified service the amount of compensation they would have received if the improper action had not been taken against them. . . ." S. Rep. No. 414, 80th Cong., 1st Sess., p. 1.

Similarly, the House Report accompanying the version ultimately enacted into law stated simply:

> "The purpose of the proposed legislation is to provide payment of compensation covering periods of separation to employees improperly removed or suspended without pay from the Federal service . . . ." H. Rep. No. 1436, 80th Cong., 2nd Sess., p. 3.

In neither report, nor in any of the interpretations from the Civil Service Commission and Comptroller General

appended to them, nor in any of the floor debate is there any suggestion that such *additional* relief was intended to preclude all other legislative, administrative, or judicial remedies. Similarly, in extending the Act to probationary employees in 1966, the House Report made it clear that the back pay provisions were merely triggered by—and in no way displaced—the normal appeals process:

> "H.R. 1647 is basically perfecting legislation. It does not create any new rights of tenure, review, or appeal. It is concerned only with adjustments in salary and other benefits that are appropriate in consequence of corrective actions that may now be taken. It requires only that, when an erroneous action has been corrected by the appropriate authority, the employee will, for pay and other employment benefit purposes, be deemed to have rendered service at his proper grade during the period . . . ." H. Rep. No. 32, 89th Cong., 1st Session, p. 2.

This view was in large part based on the interpretation given to the Act by the Chairman of the Civil Service Commission:

> "Essentially, the bill is perfecting legislation. It would fill in gaps in the backpay protection currently afforded employees in various situations. It would not add any rights of tenure, review, or appeal, *nor would it restrict or define the nature of corrective actions* . . . ."
>
> "The bill adequately safeguards the interest of agencies and employees. It does not require agencies to review actions. *It does not diminish any right or benefit employees now have.*" *Id.*, p. 10 [Emphasis added]

At the hearings on the 1966 Act, Congressman Beckworth, the author of the bill, further confirmed this narrow view:

"This bill is basically perfecting legislation, and creates no new rights of employment tenure, review or appeal. It merely authorizes adjustments in salaries and other benefits that are warranted in consequence of corrective personnel actions that may be taken under existing law . . . ." *Hearing on H.R. 1647 before the Subcommittee on Civil Service of the Senate Committee on Post Office and Civil Service*, 89th Cong., 2nd Sess. (1966), p. 2.

Finally, testimony by the Chairman of the Civil Service Commission on the 1962 predecessor of the 1966 Act demonstrates that this narrow interpretation was widely and consistently advanced:

"[The 1962 bill] is concerned only with the backpay consequence of corrective actions that may now be taken. *It has nothing to do with the substance of appeal rights, the structure of the appeals process, or the precise nature of corrective actions.* It requires only that when an erroneous action has been corrected by the appropriate authority, the employee be given backpay. *This bill enters the picture only when it has finally been decided officially, and through whatever means may be authorized now or in the future, that a wrong has been done that should be set right.*" *Hearing on H.R. 10685 before the House Committee on Post Office and Civil Service*, 87th Cong., 2nd Sess., (1962), p. 12. [Emphasis added]

In view of this insistence that the Back Pay Acts have no effect on the "substance", "structure", or "precise nature" of the corrective process, the brief remark by Senator Langer cited by petitioner can hardly be regarded as a statement of congressional intent to limit the traditional powers of the judiciary. Similarly, the selected portion of the 1966 House Report to the effect that the Act constitutes a means by which wrongfully discharged employees can be "made

whole," should be viewed as but a general theory of restitution—a theory which has always allowed injunctive relief when exceptional circumstances warrant. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506-07 (1959); *Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 13 How. 518, 561 (1851).

In sum, it is clear that Congress had no intention of precluding the jurisdiction involved in this case when it enacted the Back Pay Acts. Given this absence of legislative intent —*and* of any explicit enactment—to curtail the traditional authority of the courts to preserve their jurisdiction, that authority as embodied in the All Writs Act must be upheld.

V.

While not necessarily requiring the jurisdiction at issue in this case, both the Administrative Procedure Act and the 1972 Amendments to Title VII of the 1964 Civil Rights Act are consistent with, and may at times be dependent on, such interim injunctive relief.

Petitioner's reliance on the Attorney General's belief that Section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705, does not in and of itself confer injunctive power on a court until an appeal has been taken may well be misplaced in light of later judicial interpretations[26] and

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[26] *Compare, Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383 (1938) [cited by the Attorney General for its narrow view that the preservation power of the All Writs Act, which he apparently found analogous to the injunctive power contained in the APA, was dependent on an actual appeal], *with Chandler* v. *Judicial Council*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring in denial of writ of prohibition and/or mandamus); *F.T.C.* v. *Dean Foods*, 384 U.S. 597, 603-04 (1966); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) [All stating that the preservation power in the All Writs Act is not dependent on an

the fact that the only case cited by the Attorney General was concerned primarily with the abuse of interlocutory appeals of mere procedural rulings. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-85 (1938).

However, assuming *arguendo* that the APA does not duplicate the jurisdiction properly exercised in this case under the All Writs Act, it is nevertheless clear that the injunctive power of a court formally reviewing an agency determination is consistent with, and at times may be dependent upon, prior injunctive relief to maintain the status quo pending initial administrative action. This is, in fact, the major premise of this Court in *Dean Foods*, 384 U.S. 597, 603-04 (1966).

Similarly, the jurisdiction exercised in this case is consistent with, and may at times prove decisive in effectuating, the 1972 extension of Title VII of the 1964 Civil Rights Act to federal employees. As indicated by the incorporation by reference which applies the same procedures to private and federal employee discrimination suits, 42 U.S.C. § 2000(e)-16(d) (1972), and by the legislative history of the 1972 Amendment, H. Rep. No. 92-238, Congress clearly intended to create parallel remedies for employment discrimination in the public and private sectors.

The government states:

> "We contend here only that the district courts may not enjoin discharge of *federal* employees pending administrative review of their discharges. Whether a

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actual appeal but may be exercised to preserve a court's potential jurisdiction.]

In short, Petitioner's interpretation of Section 10(d) amounts to little more than a reiteration of its exhaustion theory.

private employer may be enjoined under certain circumstances from discharging an employee pending the processing by an administrative agency of a complaint challenging the discharge is, of course, a different question." Petitioner's Brief, p. 20, n.5.

This is apparently an attempt to distinguish, without citing, *Drew* v. *Liberty Mutual Insurance Co.*, CCH Emp. Prac. Guide ¶ 8652 (5th Cir., June 4, 1973), which approves the use of injunctive relief pending a review by the EEOC of a private discrimination complaint. It is difficult to see why, in light of the congressional intention to provide parallel remedies, this should be so. It is also difficult to see how a back pay award constitutes an exclusive remedy when granted by the Civil Service Commission to a federal employee discharged because of "race, color, religion, sex, or national origin," but is not considered exclusive when granted by the EEOC to a similarly aggrieved private employee.[27]

We are not, of course, suggesting that this case is governed by either Title VII or by previous similar laws and regulations. *See,* 5 U.S.C. § 7151; 5 C.F.R. 315.806. But it is clear that if the government is allowed to violate one of the few specific safeguards granted probationary employees (that is, the right to notice of charges based on prior conduct and the opportunity to reply to them, 5 C.F.R. 315.805), without a possibility of judicial action maintaining the *status quo* pending appeal, then it may also violate the prohibitions of racial or sexual discrimination on the same theory that the Back Pay Act precludes all judicial intervention.

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[27] *Compare* 5 U.S.C. § 5596(b) [Providing for back pay and reinstatement for aggrieved federal employees] *with* 42 U.S.C. § 2000e-5(g) (1964), as amended, 1972 [Providing for back pay and reinstatement for aggrieved private employees].

The government's attempted distinction of *Drew,* supported entirely by a breezy "of course," comes down to a bald statement that federal employees are in a position inferior to their private counterparts with regard to the same legislatively-created rights. The long history of congressional concern with protecting the rights of government employees argues to the contrary. By contrast, the view of the All Writs Act advanced by the court of appeals in Mrs. Murray's case is consistent with the clear congressional intent to extend to federal workers the same protection from job discrimination given to private employees under Title VII.

VI.

While this case will undoubtedly be applied sparingly because of the stringent requirements of injunctive relief, the underlying jurisdictional question at issue here is of critical importance.

The court of appeals explicitly warned that the type of relief granted in this case is limited to exceptional circumstances. 462 F.2d 871, 877-78. The court stressed that an employee must fully satisfy the traditional requirements for extraordinary relief in a court of equity.

Given the limited nature of judicial review in civil service appeals, few courts will find even that the employee is likely to prevail on the merits unless—as in this case—the government appears to have violated one of its own regulations *and* refuses to offer any testimony to rebut the *prima facie* case against it. Indeed, had the government produced its key witness, it might have persuaded Judge Gasch that Mrs. Murray's claim on the merits was not strong enough to qualify for injunctive relief, and the matter would have ended forthwith.

Similarly, the government will undoubtedly be able to refute most claims of irreparable injury by merely informing the court that the employee's appeal will be heard in the relatively near future. Here, of course, the government refused to process Mrs. Murray's administrative appeal. Moreover, even where the government delays the employee's appeal, trial courts will find a likelihood of irreparable harm only in certain exceptional cases. Again, it must be remembered that the probability of irreparable injury was never actually determined in this case.

It is not, therefore, surprising that the courts following this case have only rarely granted injunctive relief. Of the twelve suits cited in petitioner's brief for certiorari[28] seeking the relief granted here, ten were dismissed out of hand. In *American Federal of Government Employees* v. *Fletcher*, D. D.C. No. C.A. 1238-72, a T.R.O. was granted, but later vacated and a preliminary injunction was denied, the district court holding:

> "This is not the 'exceptional case' warranting issuance of a preliminary injunction, under the standard for interlocutory court intervention prescribed by the United States Court of Appeals for the District of Columbia Circuit in *Murray* v. *Kunzig* . . . ." *Id.*, Findings of Fact and Conclusions of Law, p. 7 (July 27, 1972).

Similarly, in *Settle* v. *Brown*, 345 F. Supp. 405 (S.D. Tex. 1972), the district court—after approving the jurisdictional holding at issue here—found that the employee had not met the likelihood of success burden and therefore was not entitled to injunctive relief.

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[28] Pet. Brief on Petition for Writ of Certiorari, p. 11.

Thus, of thirteen federal cases[29] brought on the strength of this case, there was only one, *Kirk* v. *Kleindienst*, D.D.C. No. C.A. 1397-72, in which relief was granted. Whether plaintiff there met the test of exceptional circumstances must remain unclear, since the court of appeals never had an opportunity to pass on it.[30]

Yet despite the fact that an affirmance in this case would not loose a flood of litigation, the underlying jurisdictional question at issue is of extreme importance. As noted above, if this Court accepts the government's theory that no court can ever enjoin the discharge of a federal employee pending administrative review, it will be eliminating the possibility of such judicial intervention even where the discharge is patently improper, the harm to the individual is extensive, and the necessity for injunctive relief to preserve the court's ultimate jurisdiction is manifest. It would, in short, be removing an important brake on what might otherwise become a personnel program of arbitrariness and undue delay.

A reversal in this case would also stand for the dangerous proposition that the equitable powers of the federal courts to preserve their jurisdiction can be eliminated by an attenuated interpretation of casual congressional remarks. Such a decision would cast grave doubt on the formerly clear rule that in matters of such importance only explicit

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[29] In *Jacob* v. *Burke*, 296 A.2d 456, 463-64 (1972), the Rhode Island Supreme Court cited the court of appeal's decision here with approval, but held that it was improper to grant injunctive relief without a showing of exceptional circumstances. The court further noted that the burden is on the party seeking such relief. *Id.* at 464.

[30] Following the withdrawal of the removal letter sent to Mr. Kirk, the court of appeals granted the government's motion to dismiss its own appeal of the district court's injunction. *Kirk* v. *Kleindienst*, (C.A. D.C. No. 72-1704, May 24, 1973).

legislative enactment will suffice. It would, in short, place the equitable powers of the federal courts and those who need their protection in serious jeopardy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August, 1973

SUPREME COURT

NOV 9 1973

MICHAEL RODAK, JR., CLERK

No. 72-403

In the Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. In view of respondent's concession that equitable jurisdiction does not extend to the granting of interim injunctive relief to discharged federal employees in the absence of "unique and irreparable injury" (Resp. Br. 17), closer scrutiny of her complaint may be helpful.

Respondent in her complaint failed to allege any facts amounting to "unique and irreparable injury." She alleged only that she "may be deprived of her income for an indefinite period of time, and spurious and unrebutted charges against her may remain on the record" (App. 4).[1] There is nothing unique about this

[1] Respondent also claimed that she had *already* "suffered the embarassment of being wrongfully discharged in the presence of her co-workers" (App. 4). Such a claim of past injury affords no basis for interim injunctive relief.

alleged injury; it could be asserted by any discharged federal employee.[2] Moreover, if respondent succeeds upon administrative appeal, she will be reinstated with full back pay and given an opportunity to rebut the charges against her. In short, this is a routine case in which it is apparent on the face of respondent's complaint that she has an adequate remedy at law. For the reasons stated in our main brief (pp. 18-26), such a bare claim of injury, which could be made by any discharged federal employee, is not sufficient to invoke the equitable jurisdiction of a federal district court.

2. Respondent insists (Resp. Br. 11), however, that the district court properly reserved judgment on the factual issue of irreparable harm in order to make a prior determination, after a hearing, of the likelihood of respondent's success on the merits of her administrative appeal. This insistence requires further discussion of the precise nature of respondent's claim on the merits and of the administrative appeal to which she was entitled.

Respondent did not seek equitable protection of rights originating in the constitution or a statute. Her claim was simply that her discharge had not been effected in compliance with certain regulations (5 C.F.R. 315.805) of the Civil Service Commission. Whatever the rule should be

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[2] Respondent contended for the first time in the court of appeals that a temporary loss of income *might* result in her being unable to meet ongoing financial commitments (see Pet. App. 10a). The speculative possibility of such injury—even if alleged in the complaint—would be an inadequate basis for injunctive relief. But we believe that even a conclusive showing of temporary financial distress would also be inadequate: the essence of the government's position here is that, especially in view of the Back Pay Act, 5 U.S.C. 5596, a showing of mere disruption of financial well-being does not justify the exercise of equitable jurisdiction on behalf of a discharged federal employee.

with respect to interim injunctive relief in aid of constitutional or statutory rights (see Resp. Br. 23-26), the general administrative scheme is best served by restricting the ordinary discharged federal employee—who, like respondent, rests on rights ultimately created by regulation—to the remedies available and relief afforded under the regulations, with the opportunity for judicial review after exhaustion of those remedies. Thus, as we have argued above and in our main brief, respondent's complaint should have been dismissed.

Our contention here is similar to that upheld by this Court in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. There, the seven-month limitation on the power of the Interstate Commerce Commission to suspend rate increases was read, in the context of a comprehensive regulatory scheme, as depriving the courts of power to enjoin such increases pending a final Commission order. Here, the failure of Congress to grant the Civil Service Commission power to stay an empolyee discharge pending hearing and decision by the Commission similarly implies, in the context of the general administrative scheme governing federal employees, a like absence of power in the courts. See, also, *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800.

If however, this Court determines that the district court properly refused to dismiss the complaint, the Court should nevertheless note that the procedure followed by the district court was erroneous. The court, without evaluating the nature of the injury claimed by respondent, continued a temporary restraining order against her removal pending the presentation of oral testimony by respondent's supervisor with respect to the reasons for her discharge. This procedure was wrong for two separate reasons.

First, in order to minimize judicial interference with the operations of the federal employing agency, the court should have determined whether respondent had shown that she would suffer irreparable injury before subjecting a federal officer to cross-examination with respect to his official acts.

Second, the district court had no basis for requiring the oral testimony of respondent's supervisor. Respondent's administrative remedy was an appeal to the Civil Service Commission that would be heard on the basis of written submissions. 5 C.F.R. 315.806 and 772.304.[3] In determining the likelihood of respondent's success on that appeal, there was no occasion for the taking of oral testimony; at the very most, as the government stressed at the hearing before the trial judge (App. 38-39, 42-43), the district court should have reviewed only the documentary evidence that would be before the Commission on appeal. The order continuing the temporary restraining order pending the taking of oral testimony was therefore erroneous, whether or not some other form of interim injunctive relief may have been appropriate.

Respectfully submitted.

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Attorney.

NOVEMBER 1973.

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[3] Respondent does not challenge the validity of these summary procedures, which apply only to probationary employees.

Syllabus

SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. *v.* MURRAY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-403. Argued November 14, 1973—
Decided February 19, 1974

Upon being notified that she was going to be discharged on a specific date from her position as a probationary Government employee, respondent filed this action claiming that the applicable Civil Service regulations for discharge of probationary employees had not been followed, and seeking a temporary injunction against her dismissal pending an administrative appeal to the Civil Service Commission (CSC). The District Court granted a temporary restraining order, and after an adversary hearing at which the Government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, ordered the temporary injunctive relief continued. The Court of Appeals affirmed, rejecting the Government's contention that the District Court had no authority to grant temporary injunctive relief in this class of cases, and holding that the relief granted was within the permissible bounds of the District Court's discretion. *Held:* While the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, nevertheless under the standards that must govern the issuance of such relief the District Court's issuance of the temporary injunctive relief here cannot be sustained. Pp. 68-92.

(a) The District Court's authority to review agency action, *Service* v. *Dulles*, 354 U. S. 363, does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to the applicable regulations, and until administrative action has become final, no court is in a position to say that such action did or did not conform to the regulations. Here the District Court authorized, on an interim basis, relief that the CSC had neither considered nor authorized—the mandatory reinstatement of respondent in her Government position. *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4; *FTC* v. *Dean Foods Co.*, 384 U. S. 597, distinguished. Pp. 71-78.

(b) Considering the disruptive effect that the grant of temporary relief here was likely to have on the administrative process, and in view of the historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; the well-established rule that the Government be granted the widest latitude in handling its own internal affairs; and the traditional unwillingness of equity courts to enforce personal service contracts, the Court of Appeals erred in routinely applying the traditional standards governing more orthodox "stays," and respondent at the very least must show irreparable injury sufficient in kind and degree to override the foregoing factors. Pp. 78–84.

(c) Viewing the order at issue as a preliminary injunction, the Court of Appeals erred in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury, and in intimating that, as alleged in respondent's unverified complaint, either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury. Pp. 84–92.

149 U. S. App. D. C. 256, 462 F. 2d 871, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 92. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 97.

Keith A. Jones argued the cause for petitioners. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Wood, Acting Assistant Attorney General Jaffe, Samuel Huntington*, and *Walter H. Fleischer*.

Thomas J. McGrew argued the cause for respondent *pro hac vice*. With him on the brief was *James A. Dobkin*.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent is a probationary employee in the Public Buildings Service of the General Services Administration (GSA). In May 1971, approximately four months

after her employment with GSA began, she was advised in writing by the Acting Commissioner of the Public Buildings Service, W. H. Sanders, that she would be discharged from her position on May 29, 1971. She then filed this action in the United States District Court for the District of Columbia, seeking to temporarily enjoin her dismissal pending her pursuit of an administrative appeal to the Civil Service Commission. The District Court granted a temporary restraining order, and after an adversary hearing extended the interim injunctive relief in favor of respondent until the Acting Commissioner of the Public Buildings Service testified about the reasons for respondent's dismissal.

A divided Court of Appeals for the District of Columbia Circuit affirmed,[1] rejecting the Government's contention that the District Court had no authority whatever to grant temporary injunctive relief in this class of cases, and holding that the relief granted by the District Court in this particular case was within the permissible bounds of its discretion. We granted certiorari, *sub nom. Kunzig* v. *Murray*, 410 U. S. 981 (1973). We agree with the Court of Appeals that the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, but conclude that, judged by the standards which we hold must govern the issuance of such relief, the issuance of the temporary injunctive relief by the District Court in this case cannot be sustained.

I

Respondent was hired as a program analyst by the Public Buildings Service after previous employment in the Defense Intelligence Agency. Under the regulations

[1] *Murray* v. *Kunzig*, 149 U. S. App. D. C. 256, 462 F. 2d 871 (1972). For a discussion of the Court of Appeals' jurisdiction, and the jurisdiction of this Court, see *infra*, at 86–88.

of the Civil Service Commission, this career conditional appointment was subject to a one-year probationary period.[2] Applicable regulations provided that respondent, during this initial term of probation, could be dismissed without being afforded the greater procedural advantages available to permanent employees in the competitive service.[3] The underlying dispute between the parties arises over whether the more limited procedural requirements applicable to probationary employees were satisfied by petitioners in this case.

The procedural protections which the regulations accord to most dismissed probationary employees are limited. Commonly a Government agency may dismiss a probationary employee found unqualified for continued employment simply "by notifying him in writing as to why he is being separated and the effective date of the action."[4] More elaborate procedures are specified when the ground for terminating a probationary employee is "for conditions arising before appointment."[5] In such cases the regulations require that the employee receive "an advance written notice stating the reasons, specifically and in detail, for the proposed action"; that the employee be given an opportunity to respond in writing and to furnish affidavits in support of his response; that the agency "consider" any answer filed by the employee in reaching its decision; and that the employee be notified of the agency's decision at the earliest practicable date.[6] Respondent contends that her termina-

[2] 5 CFR § 315.801.

[3] Compare 5 CFR §§ 315.801–315.807 with 5 CFR § 752.101 *et seq.*

[4] 5 CFR § 315.804.

[5] 5 CFR § 315.805.

[6] Section 315.805 reads in full:

"§ 315.805 Termination of probationers for conditions arising before appointment.

"When an agency proposes to terminate an employee serving a

tion was based in part on her activities while in the course of her previous employment in the Defense Intelligence Agency, and that therefore she was entitled to an opportunity to file an answer under this latter provision.

The letter which respondent received from the Acting Commissioner, notifying her of the date of her discharge, stated that the reason for her discharge was her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors." After receipt of the letter, respondent's counsel met with a GSA personnel officer to discuss her situation and, in the course of the meeting, was shown a memorandum prepared by an officer of the Public Buildings Service upon which Sanders apparently based his decision to terminate respondent's employment. The memorandum contained both a discussion of respondent's conduct in her job with the Public Buildings Service and a discussion of her conduct during her previous employment at the Defense

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probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

"(a) *Notice of proposed adverse action.* The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

"(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

"(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806 (d)."

Intelligence Agency. Relying upon the inclusion of the information concerning her previous employment, respondent's counsel requested that she be given a detailed statement of the charges against her and an opportunity to reply—the procedures to which she would be entitled under the regulations if in fact the basis of her discharge had been conduct during her previous employment. This request was denied.

Respondent then filed an administrative appeal with the Civil Service Commission pursuant to the provisions of 5 CFR § 315.806 (c), alleging that her termination was subject to § 315.805 and was not effected in accordance with the procedural requirements of that section.[1] While her administrative appeal was pending undecided, she filed this action. Her complaint alleged that the agency had failed to follow the appropriate Civil Service regulations, alleged that her prospective discharge would deprive her of income and cause her to suffer the embarrassment of being wrongfully discharged, and requested a temporary restraining order and interim injunctive relief against her removal from employment pending agency determination of her appeal. The District Court granted the temporary restraining order at the time of the filing of respondent's complaint, and set a hearing on the application for a temporary injunction for the following week.

At the hearing on the temporary injunction, the District Court expressed its desire to hear the testimony of Sanders in person, and refused to resolve the controversy on the basis of his affidavit which the Government offered to furnish. When the Government declined

[1] Section 315.806 (c) reads:

"A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section."

to produce Sanders, the court ordered the temporary injunctive relief continued, stating that "Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim." [8] The Government, desiring to test the authority of the District Court to enter such an order, has not produced Sanders, and the interim relief awarded respondent continues in effect at this time.

On the Government's appeal to the Court of Appeals for the District of Columbia Circuit, the order of the District Court was affirmed. Although recognizing that "Congress presumably could remove the jurisdiction of the District Courts to grant such equitable interim relief, in light of the remedies available," [9] the court found that the District Court had the power to grant relief in the absence of an explicit prohibition from Congress. The Court of Appeals decided that the District Court acted within the bounds of permissible discretion in requiring Sanders to appear and testify,[10] and in continuing the temporary injunctive relief until he was produced as a witness by the Government.

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[8] The order of the District Court stated in full:

"It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim,

"NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p. m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders.

"IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith."

[9] 149 U. S. App. D. C., at 262 n. 21, 462 F. 2d, at 877 n. 21.

[10] *Id.*, at 263–264, 462 F. 2d, at 878–879.

II

While it would doubtless be intellectually neater to completely separate the question whether a District Court has authority to issue any temporary injunctive relief at the behest of a discharged Government employee from the question whether the relief granted in this case was proper, we do not believe the questions may be thus bifurcated into two watertight compartments. We believe the basis for our decision can best be illuminated by taking up the various arguments which the parties urge upon us.

Petitioners point out, and the Court of Appeals below apparently recognized, that Congress has given the District Courts no express statutory authorization to issue temporary "stays" in Civil Service cases. Although Congress has often specifically conferred such authority when it so desired—for example, in the enabling statutes establishing the NLRB,[11] the FTC,[12] the FPC,[13] and the SEC[14]—the statutes governing the Civil Service Commission are silent on the question.[15] The rules and regu-

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[11] 29 U. S. C. §§ 160 (j), (*l*).

[12] 15 U. S. C. § 53 (a).

[13] 16 U. S. C. § 825m (a).

[14] 15 U. S. C. § 78u (e); 15 U. S. C. § 77t (b).

[15] Respondent does suggest that 5 U. S. C. § 705 may confer authority to grant relief in this case. That section reads:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

The relevant legislative history of that section, however, indicates

lations promulgated pursuant to a broad grant of statutory authority likewise make no provision for interlocutory judicial intervention.

The Court of Appeals nevertheless found that the district courts had traditional power to grant stays in such personnel cases. Commenting upon the Government's arguments for reversal below, the court stated:

> "It is asserted that the Civil Service Commission has been given exclusive review jurisdiction. But, as noted initially, there is no statutory power in the Civil Service Commission to grant a temporary stay of discharge. Prior to the Civil Service Act a United States District Court would certainly have had jurisdiction and power to grant such temporary relief. The statute did not explicitly take it away, nor implicitly by conferring such jurisdiction and power on the CSC; we hold the District Court still has jurisdiction and may exercise the power under established standards in appropriate circumstances." [16]

If the issue were to turn solely on the earlier decisions of this Court examining the authority of federal courts to intervene in disputes about governmental employment, we think this assumption of the Court of Appeals is wrong. In *Keim* v. *United States*, 177 U. S. 290 (1900), this Court held that the Court of Claims had no authority to award damages to an employee who claimed he

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that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine, discussed *infra*, and not to fashion new rules of intervention for District Courts. See S. Rep. No. 752, 79th Cong., 1st Sess., 27, 44 (1945). Thus respondent's various contentions may be grouped under her primary theory discussed in the text.

[16] 149 U. S. App. D. C., at 265, 462 F. 2d, at 880 (footnotes omitted).

had been wrongfully discharged by his federal employer.[17] In *White* v. *Berry*, 171 U. S. 366 (1898), a Government employee had sought to enjoin his employer from dismissing him from office, alleging that the removal would violate both the Civil Service Act and the applicable regulations.[18] The circuit court assumed jurisdiction and issued an order prohibiting the defendant from inter-

[17] The Court there expressed the traditional judicial deference to administrative processes in the following terms:

"The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

"In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. 'It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' *In re Hennen*, 13 Pet. 230, 259; *Parsons* v. *United States*, 167 U. S. 324. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed." 177 U. S., at 293–294.

[18] The plaintiff in *White* protested that he was being discharged because of his political affiliation, a basis for discharge specifically prohibited under the Civil Service rules. 171 U. S., at 367–368. Such a contention obviously went to the heart of the Civil Service legislation, since a primary purpose of that system was to remove large sectors of Government employment from the political "spoils system" which had previously played a large part in the selection and discharge of Government employees. See generally H. Kaplan, The Law of Civil Service 1–22 (1958).

fering with the plaintiff's discharge of his duty " 'until he shall be removed therefrom by proper proceedings had under the Civil Service Act and the rules and regulations made thereunder or by judicial proceedings at law . . . .' " [19] This Court reversed. Discussing the apparently well-established principle that " 'a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee,' " [20] the Court held that "the Circuit Court, sitting in equity, was without jurisdiction to grant the relief asked." [21]

Respondent's case, then, must succeed, if at all, despite earlier established principles regarding equitable intervention in disputes over tenure of governmental employees, and not because of them. Much water has flowed over the dam since 1898, and cases such as *Service* v. *Dulles*, 354 U. S. 363 (1957), cited by the District Court in its memorandum opinion in this case, establish that federal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations.[22] In that case, however, judicial pro-

[19] 171 U. S., at 374–375.

[20] The Court quoted from *Morgan* v. *Nunn*, 84 F. 551, and noted that "[s]imilar decisions have been made in other Circuit Courts of the United States." 171 U. S., at 377–378.

[21] *Id.*, at 378.

[22] In *Service* an employee discharged under the provisions of the McCarran Rider, 65 Stat. 581, contended that the Secretary of State had not followed departmental regulations in effecting his dismissal. This Court agreed with plaintiff's position and decided that his "dismissal cannot stand." 354 U. S., at 388. However, the employee in that case had made a full effort to secure administrative review of his discharge prior to filing suit in the District Court. These efforts, as the Court noted, *id.*, at 370, had "proved unsuccessful." In the present case respondent has petitioned the court before ascertaining whether administrative relief will be granted.

ceedings were not commenced until the administrative remedy had been unsuccessfully pursued.[23] The fact that Government personnel decisions are now ultimately subject to the type of judicial review sought in *Service* v. *Dulles*, *supra*, does not, without more, create the authority to issue interim injunctive relief which was held lacking in cases such as *White* v. *Berry*, *supra*.

The Court of Appeals found support for its affirmance of the District Court's grant of injunctive relief in *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4 (1942). In *Scripps-Howard* the licensee of a Cincinnati radio station petitioned the FCC to vacate an order permitting a Columbus radio station to change its frequency and to increase its broadcasting power. The licensee also requested a hearing. When the Commission denied the petition, the licensee filed a statutory appeal in the Court of Appeals for the District of Columbia and, in conjunction with the docketing of the appeal, asked the court to stay the FCC order pending its decision. The Court of Appeals, apparently departing from a longstanding policy of issuing such stays,[24] declined to do so in this case and ultimately certified the question of its power to this Court.[25]

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[23] See n. 22, *supra*.

[24] The Court pointed out that "even though the Radio Act of 1927 contained no provisions dealing with the authority for the Court of Appeals for the District of Columbia to stay orders of the Commission on appeal, the Court had been issuing stays as a matter of course wherever they were found to be appropriate, without objection by the Commission." *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 13 (1942).

[25] The precise question certified was:

" 'Where, pursuant to the provisions of Section 402 (b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the

This Court held that the Court of Appeals had power to issue the stay, analogizing it to the traditional stay granted by an appellate court pending review of an inferior court's decision:

> "It has always been held, therefore, that as part of its traditional equipment for the administration of justice,[*] a federal court can stay the enforcement of a judgment pending the outcome of an appeal." [26]

But in *Scripps-Howard* the losing party before the agency sought an interim stay of final agency action pending statutory judicial review.[27] A long progression of cases in this Court had established the authority of a court, empowered by statute to exercise appellate jurisdiction, to issue appropriate writs in aid of that jurisdiction.[28] The All Writs Act, first enacted as a part of the Judiciary Act of 1789, provided statutory confirmation of this

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Commission's order from which the appeal was taken, pending the determination of the appeal?'" *Id.*, at 6.

The wording of the question certified makes clear that the Court was faced only with the situation in which an appeal has been filed seeking review of completed agency action.

[26] *Id.*, at 9–10. In the Court's opinion a footnote, herein designated with an asterisk, referred to the All Writs Act, 28 U. S. C. § 1651 (a), which reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The reliance of the Court on this provision was noted by the Court of Appeals in its opinion in this case. 149 U. S. App. D. C., at 261 n. 17, 462 F. 2d, at 876 n. 17.

[27] See n. 25, *supra*.

[28] For example, the two cases cited by the Court in *Scripps-Howard* involved situations in which a court accepted appeal jurisdiction and, in connection with that acceptance, issued a stay of the decision below. See *In re Claasen*, 140 U. S. 200 (1891) (writ of error to this Court); *In re McKenzie*, 180 U. S. 536 (1901) (appeal taken to the Circuit Court of Appeals). The All Writs Act, n. 26, *supra*, provided the authority in each case.

authority.[29] This Court in *Scripps-Howard* held that the same principles governed the authority of courts charged by statute with judicial review of agency decisions, and that the authority to grant a stay exists in such a court even though not expressly conferred by the statute which confers appellate jurisdiction.

Scripps-Howard, supra, of course, is not the instant case. The authority of the District Court to review agency action under *Service* v. *Dulles, supra,* does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to applicable regulations.[30] Until administrative action has become final, no court is in a position to say that such action did or did not conform to applicable regulations. Here respondent had obtained no administrative determination of her appeal at the time she brought the action in the District Court. She was in effect asking that court to grant her, on an interim basis, relief which the administrative agency charged with review of her employer's action could grant her only after it had made a determination on the merits.

While both the District Court and the Court of Appeals characterized the District Court's intervention as a "stay," the mandatory retention of respondent in the position from which she was dismissed actually served to provide the most extensive relief which she might conceivably obtain from the agency after its review on the merits. It may well be that the Civil Service Commission, should it have agreed with respondent's version of the basis for her dismissal, would prohibit the final

[29] See n. 26, *supra.*

[30] See n. 22, *supra.* As noted above, the employee in *Service* sought to have the Secretary's action declared invalid within the administrative system. He sought judicial relief only after it became evident that no administrative relief would be forthcoming.

separation of respondent unless and until proper procedures had been followed. But this is not to say that it would hold respondent to be entitled to full reinstatement with the attendant tension with her superiors that the agency intended to avoid by dismissing her. Congress has provided that a wrongfully dismissed employee shall receive full payment and benefits for any time during which the employee was wrongfully discharged from employment.[21] The Civil Service Commission could conceivably accommodate the conflicting claims in this case by directing respondent's superiors to provide her with an opportunity to reply by affidavit, and by ordering that she receive backpay for any period of her dismissal prior to the completion of the type of dismissal procedure required by the regulations.

The Court in *Scripps-Howard* recognized that certain forms of equitable relief could not properly be granted by federal courts. The Court specifically contrasted the stay of a license grant and the stay of a license denial, finding that the latter would have no effect:

> "Of course, no court can grant an applicant an authorization which the Commission has refused.

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[21] The Back Pay Act is found at 5 U. S. C. § 5596. The pertinent provisions read:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . . ."

> No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize." [32]

Surely that conclusion would not vary depending upon whether the radio station had started broadcasting on its own initiative and sought to stay a Commission order directing it to cease. Yet here the District Court did authorize, on an interim basis, relief which the Civil Service Commission had neither considered nor authorized—the mandatory reinstatement of respondent in her Government position. We are satisfied that *Scripps-Howard*, involving as it did the traditional authority of reviewing courts to grant stays, provides scant support for the injunction issued here.

The Court of Appeals also relied upon *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966), in reaching its decision. There a closely divided Court held that a Court of Appeals having ultimate jurisdiction to review orders of the Federal Trade Commission might, upon the Commission's application,[33] grant a

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[32] 316 U. S., at 14.

[33] A preliminary question of importance in *Dean Foods* was whether the Commission, in the absence of express statutory authorization, could petition the Court of Appeals for preliminary relief. This Court said:

"[T]he Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental

temporary injunction to preserve the controversy before the agency. The Commission's application alleged,[34] and the court accepted,[35] that refusal to grant the injunction would result in the practical disappearance of one of the entities whose merger the Commission sought to challenge. The disappearance, in turn, would mean that the agency, and the court entrusted by statute with authority to review the agency's decision, would be incapable of implementing their statutory duties by fashioning effective relief. Thus invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate.

Neither the reviewing jurisdiction of the Civil Service Commission nor that of the District Court would be similarly frustrated by a decision of the District Court remitting respondent to her administrative remedy. Certainly the Civil Service Commission will be able to weigh respondent's contentions and to order necessary relief without the aid of the District Court injunction. In direct contrast to the claim of the FTC in *Dean Foods* that its jurisdiction would be effectively defeated by

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power to ask the courts of appeals to exercise their authority derived from the All Writs Act." 384 U. S., at 606.

A contrary decision, the Court felt, would have made it virtually impossible for the Commission itself to undertake review of the proposed merger. The congressional grant of authority to the FTC in Clayton Act cases thus could have been frustrated.

[34] *Id.*, at 599–600. The complaint charged that one of the parties to the merger "'as an entity will no longer exist,'" *id.*, at 599, and that "consummation of the agreement would 'prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits.'" *Id.*, at 600. The Commission therefore was affirmatively asserting that the administrative remedy which it was authorized to fashion was inadequate.

[35] *Id.*, at 601.

denial of relief, the Commission here has argued that judicial action interferes with the normal agency processes.[36] And we see nothing in the record to suggest that any judicial review available under the doctrine of *Service* v. *Dulles* would be defeated in the same manner as review in *Dean Foods*.

We are therefore unpersuaded that the temporary injunction granted by the District Court in this case was justified either by our prior decisions dealing with the availability of injunctive relief to discharged federal employees, or by those dealing with the authority of reviewing courts to grant temporary stays or injunctions pending full appellate review. If the order of the District Court in this case is to be upheld, the authority must be found elsewhere.

III

This Court observed in *Scripps-Howard* that "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage," 316 U. S., at 11, and this observation carries particular force when a statutory scheme grants broad regulatory latitude to an administrative agency. In *Scripps-Howard* a careful review of the relevant statutory provisions and legislative history persuaded this Court that Congress had not intended to nullify the power of an appellate court,[37] having assumed jurisdiction after an agency decision, to issue stays in aid of its jurisdiction. The Court noted, in

[36] In *Dean Foods* the Commission confessed its inability to fashion effective administrative relief. But petitioners here admit no such thing. Rather they strongly assert that the Back Pay Act, n. 31, *supra*, provides a complete remedy for any procedural irregularities which may have occurred in this case.

[37] 316 U. S., at 11–13.

particular, that stays were allowed in other cases processed through the FCC [38] and that the Court of Appeals had routinely issued stays in similar cases before undertaking an unexpected shift in policy.[39] But, at the other end of the spectrum, in *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), this Court held that a specific congressional grant of power to the ICC to suspend proposed rate modifications precluded the District Court from extending the suspension by temporary injunction. This was true despite arguments that district courts traditionally had such power and that Congress did not explicitly revoke the power by statute.[40] The Court there said:

> "The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be

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[38] The Court compared the provisions of §§ 402 (a) and 402 (b) of the Communications Act of 1934, 48 Stat. 1064. The former section specifically authorized temporary stays, through application of the Urgent Deficiencies Act of Oct. 22, 1913, 38 Stat. 208, of orders of the Federal Communications Commission which were under review—with certain exceptions. Those exceptions, which included the order there at issue, were treated under § 402 (b) which made no specific provision for such stays. The Court thus was required to consider whether Congress deliberately sought to deprive courts of a power in those cases not governed by the Urgent Deficiencies Act which had been expressly authorized for those cases which were governed by the Act.

[39] See n. 24, *supra*.

[40] Although acknowledging that the legislative history did not clearly establish "a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates," the Court concluded: "[W]e cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head." 372 U. S., at 664.

out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." [41]

The overall scheme governing employees of the Federal Government falls neatly within neither of these precedents. Unlike *Scripps-Howard*, traditional stay practice lends little support to the sort of relief which the District Court granted respondent here, and the precedents dealing with the availability of equitable relief to discharged Government employees are quite unfavorable to respondent. Unlike *Arrow Transportation, supra*, the administrative structure is far more a creature of agency regulations than of statute. We are thus not prepared to conclude that Congress in this class of cases has wholly divested the district courts of their customary authority to grant temporary injunctive relief, and to that extent we agree with the Court of Appeals. But merely because the factors relied upon by the Government do not establish that the district courts are wholly bereft of the authority claimed for them here does not mean, as the Court of Appeals appeared to believe, that temporary injunctive relief in this class of cases is to be dispensed without regard to those factors. While considerations similar to those found sufficient in *Arrow Transportation* to totally deprive the District Courts of equitable authority do not have that force here, they nonetheless are entitled to great weight in the equitable balancing process which attends the grant of injunctive relief.

We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections,[42] but with a probationary employee, a class which Con-

[41] 372 U. S., at 668. (Emphasis in original.)

[42] See 5 U. S. C. § 7501.

gress has specifically recognized as entitled to less comprehensive procedures. Section 3321 of Title 5 of the United States Code, derived from the original Pendleton Act,[43] requires the creation of this classification:

> "The President may prescribe rules, which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute."

It is also clear from other provisions in the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service. For example, preference eligibles,[44] commonly veterans, are entitled to hearing procedures extended to persons in the competitive service *only after they have completed* "a probationary or trial period." [45] Persons suspended for national security reasons are given expanded protection *provided they have completed a trial or probationary period.*[46]

The Civil Service regulations are consistent with these statutes. These regulations are promulgated by the Civil Service Commission as authorized by Congress in

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[43] 22 Stat. 404.

[44] See 5 U. S. C. § 2108 (3).

[45] 5 U. S. C. §§ 7511–7512. Section 7511 defines a "preference eligible employee" as "a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia . . . ," subject to certain exceptions. Section 7512 provides that such an employee must receive written notice of the reasons for proposed adverse action, a chance to reply in writing and by affidavit, and notice of an adverse decision. A probationary employee, under the regulations, has more limited rights. See 5 CFR § 315.801 *et seq.*

[46] 5 U. S. C. § 7532 (c) (2).

5 U. S. C. §§ 1301, 1302.[47] Part 752, the section governing adverse agency actions, provides certain procedural safeguards for employees but, as did the statutes cited above, exempts "employee[s] currently serving a probationary or trial period." [48] Such employees are remitted to the procedures specified in subpart H of Part 315,[49] the procedures at issue here. Under § 752.202 of the regulations permanent competitive service employees are to be retained in an active-duty status only during the required 30-day-notice period, and the Commission is given no authority to issue additional stays.[50] It cannot prevent the dismissal of an employee or order his reinstatement prior to hearing and determining his appeal on the merits. Reasonably, a probationary employee could be entitled to no more than retention on active duty for the period preceding the effective date of his discharge.

Congress has also provided a broad remedy for cases of improper suspension or dismissal. The Back Pay Act of 1948 [51] supplemented the basic Lloyd-LaFollette Act of 1912 and provided that any person in the competitive

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[47] Title 5 U. S. C. § 3301 *et seq.* grants to the President authority to promulgate rules and regulations governing the Civil Service. Title 5 U. S. C. § 1301 provides that "[t]he Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service." Title 5, § 1302, empowers the Commission to prescribe regulations, "subject to the rules prescribed by the President . . . ."

[48] 5 CFR § 752.103 (a)(5).

[49] 5 CFR § 315.801 *et seq.*

[50] Title 5 CFR § 752.202 (d) reads in part:

"Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period."

Section 752.202 (a)(1) provides that "at least 30 full days' advance written notice" is required.

[51] See n. 31, *supra*.

Civil Service who was unjustifiably discharged and later restored to his position was entitled to full backpay for the time he was out of work. The benefits of this Act were extended to additional employees, including probationary employees, in 1966.[52] Respondent was eligible for full compensation for any period of improper discharge under this section.

As we have noted, respondent's only substantive claim, either before the District Court or in her administrative appeal, was that petitioners had violated the regulations promulgated by the Civil Service Commission. Those same regulations provided for an appeal to the agency which promulgated the regulations and further provided that until that appeal had been heard on the merits, the employer's discharge of the employee was to remain in effect. Respondent, however, sought judicial intervention before fully utilizing the administrative scheme.

The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical denial of all equitable relief by the federal courts in cases such as *White* v. *Berry*, 171 U. S. 366 (1898), the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896 (1961), and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee, 5A A. Corbin, Contracts § 1204 (1964), we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional

[52] 80 Stat. 94, 95.

standards governing more orthodox "stays." See *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958).[83] Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases. We now turn to the showing made to the District Court on that issue, and to the Court of Appeals' treatment of it.

IV

The Court of Appeals said in its opinion:

> "Without passing on the merits of Mrs. Murray's contention that she will suffer irreparable harm if the sought-for-relief is not granted (a task for the District Court here), we note that there was a determination that such a loss of employment could be 'irreparable harm' in Reeber v. Rossell (1950), a case quite similar to that at bar. We agree with the *Reeber* court that such a loss of employment *can* amount to irreparable harm, and that injunctive relief *may* be a proper remedy pending the final administrative determination of the validity of the discharge by the Civil Service Commission." [84]

[83] These considerations were set forth by the majority below as follows:

"(1) Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal? (2) Has the petitioner shown that without such relief he will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?" 149 U. S. App. D. C., at 263, 462 F. 2d, at 878.

[84] *Id.*, at 262, 462 F. 2d, at 877 (emphasis in original).

At another point in its opinion, the Court of Appeals said:

> "As the District Court here felt that the hearing on the motion for the preliminary injunction could not be completed until Mr. Sanders was produced to testify, it was proper for him to continue the stay, in order to preserve the *status quo* pending the completion of the hearing." [55]

The court in its supplemental opinion filed after the Government's petition for rehearing further expanded its view of this aspect of the case:

> "The court's opinion does not hold, and the trial judge has not yet held, that interim relief *is proper* in Mrs. Murray's case, but we do hold that the trial judge may consider granting such relief, as this is inherent in his historical equitable role." [56]

In form the order entered by the District Court now before us is a continuation of the temporary restraining order originally issued by that court.[57] It is clear from the Court of Appeals' opinion that that court so construed it. But since the order finally settled upon by the District Court was in no way limited in time, the provisions of Fed. Rule Civ. Proc. 65 come into play. That rule states, in part:

> "(b) A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before

[55] *Id.*, at 265, 462 F. 2d, at 880.
[56] *Id.*, at 270, 462 F. 2d, at 885 (emphasis in original).
[57] See n. 8, *supra*.

> the adverse party or his attorney can be heard in opposition . . . . Every temporary restraining order granted without notice . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

The Court of Appeals whose judgment we are reviewing has held that a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction, and must conform to the standards applicable to preliminary injunctions. *National Mediation Board* v. *Airline Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963). We believe that this analysis is correct, at least in the type of situation presented here, and comports with general principles imposing strict limitations on the scope of temporary restraining orders.[33] A dis-

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[33] The Court of Appeals for the Second Circuit, in an opinion cited by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board* v. *Airline Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963), described these principles as follows:

"It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65 (b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.

"It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the

trict court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore we

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final judgment rule to permit review of preliminary injunctions. 28 U. S. C. § 1292 (a)(1). To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued *without* a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision.

"We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U. S. C. § 1292 (a)(1)." (Citations omitted; emphasis in original.) *Pan American World Airways* v. *Flight Engineers' Assn.*, 306 F. 2d 840, 843 (1962).

Our Brother MARSHALL, in his dissenting opinion, nevertheless suggests that a district court can totally or partially impede review of an indefinite injunctive order by failing to make any findings of fact or conclusions of law. It would seem to be a consequence of this reasoning that an order which neglects to comply with one rule may be saved from the normal appellate review by its failure to comply with still another rule. We do not find this logic convincing. Admittedly, the District Court did not comply with Fed. Rule Civ. Proc. 52 (a), but we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports the issuance of injunctive relief. As discussed below, nothing in the pleadings or affidavits, or in the testimony at the hearing before the District Court, demonstrates that this is an extraordinary case supporting the award of judicial relief. See n. 68, *infra*.

view the order at issue here as a preliminary injunction.

We believe that the Court of Appeals was quite wrong in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury.[59] This Court has stated that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 506–507 (1959), and the Court of Appeals itself in *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958), has recognized as much. Yet the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury.[60] We are therefore somewhat puzzled

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[59] We note that Rule 65 requires a showing of irreparable injury for the issuance of a temporary restraining order as well. Therefore, for the purposes of this part of the discussion, it would make no difference that the order was styled a temporary restraining order, rather than a preliminary injunction.

[60] The affidavit in its entirety states:

"JEANNE M. MURRAY, being first duly sworn, deposes as follows:

"1. I am presently employed by the Public Buildings Service of the General Services Administration (GSA) as a Program Analyst, GS–13.

"2. On May 20, 1971, at approximately five p. m., I was given a letter signed by Mr. W. H. Sanders, Acting Commissioner of the Public Buildings Service, informing me that my employment was to be terminated as of Saturday, May 29, 1971.

"3. I have never been told that GSA's Personnel files contain adverse information about my service in the Defense Intelligence Agency (DIA), nor have I ever seen a memorandum dealing with my employment there.

"4. I worked for slightly over a year at the DIA, and I have been

about the basis for the District Court's conclusion that respondent "may suffer immediate and irreparable injury." The Government has not specifically urged this procedural issue here, however, and the Court of Appeals in its opinion discussed the elements upon which it held that the District Court might base a conclusion of irreparable injury. Respondent's unverified complaint alleged that she might be deprived of her income for an indefinite period of time, that spurious and unrebutted charges against her might remain on the record, and that she would suffer the embarrassment of being wrongfully discharged in the presence of her coworkers.[61] The Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief.[62] We disagree.[63]

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informed by the Acting Chief of Staff of the DIA, Rear Admiral D. E. Bergin, that my personnel file at DIA contains nothing derogatory to me.

"5. In recent weeks, I was informed by Mr. William Mulroney, a DIA employee, that someone from GSA had been making inquiries of DIA personnel about my term of service there."

[61] Complaint, par. 12.

[62] 149 U. S. App. D. C., at 262, 462 F. 2d, at 877.

[63] The Court of Appeals held that the Government's failure to produce witness Sanders, after the District Court chose to hear him orally, rather than to rely on his affidavit, allowed the District Court to continue the temporary restraining order until Sanders appeared. We have no doubt that a district court in appropriate circumstances may be justified in resolving against a party refusing to produce a witness under his control the relevant issues upon which that witness' testimony might have touched. But it is clear from the record that the testimony of the witness Sanders was desired to test the basis upon which respondent was discharged, testimony which, of course, would go to the issue of respondent's ultimate chances for success on the merits. While the District Court may

Even under the traditional standards of *Virginia Petroleum Jobbers, supra*, it seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.[64] In that case the court stated:

> "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." [65]

This premise is fortified by the Back Pay Act discussed above.[66] This Act not only affords monetary relief which will prevent the loss of earnings on a periodic basis from being "irreparable injury" in this type of case, but

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well have been entitled to resolve *that* issue against the Government at that stage of the proceeding, this conclusion in no way dispenses with the necessity for a conclusion that irreparable injury will occur, since that is a separate issue that must be proved to the satisfaction of the Court by the person seeking equitable relief.

[64] It should be noted that *Virginia Petroleum Jobbers* dealt with a fact situation quite dissimilar to this one. There the Federal Power Commission had denied petitioner leave to intervene in proceedings before the Commission. In conjunction with appeal of that decision the petitioner had filed a "motion for a stay of further proceedings pending completion of [the Court's] review of the Commission's orders denying intervention or rehearing." 104 U. S. App. D. C., at 109, 259 F. 2d, at 924. Such a fact situation was far closer to the traditional situation in which equity powers have been employed to grant a stay pending appeal than is the situation involved in the instant case.

[65] 104 U. S. App. D. C., at 110, 259 F. 2d, at 925 (emphasis in original).

[66] N. 31, *supra*.

its legislative history suggests that Congress contemplated that it would be the usual, if not the exclusive, remedy for wrongful discharge. The manager of the bill on the floor of the Senate, Senator Langer, commented on the bill at the time of its passage:

> "[It] . . . provides that an agency or department of the Government may remove any employee at any time, but that the employee shall then have a right of appeal. When he is removed, he is of course off the pay roll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended." [67]

Respondent's complaint also alleges, as a basis for relief, the humiliation and damage to her reputation which may ensue. As a matter of first impression it would seem that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by an administrative determination requiring the agency to conform to the applicable regulations. Respondent's claim here is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge.

Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the

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[67] 94 Cong. Rec. 6681 (1948).

issuance of a temporary injunction in this type of case.[22] We therefore reverse the decision of the Court of Appeals which approved the action of the District Court.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I think with all respect that while the narrow isolated issue involved in this litigation is exposed in the opinion of the Court the nature of the problem is not.

Respondent, a probationary employee, claims that her discharge was not based exclusively on her work as a probationary employee. If it were based on her work as a probationary employee, the procedure is quite summary and her right of appeal to the Civil Service Commission is limited to only a few grounds such as discrimination based on race, color, religion, sex, or national origin, 5 CFR § 315.806. But her claim is that her discharge was based, at least in part, on conduct prior to her federal employment. In case that prior conduct is the basis of the discharge, the employee is entitled to advance notice of proposed termination, an oppor-

[22] We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the Court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case. See also *Wettre* v. *Hague*, 74 F. Supp. 396 (Mass. 1947); vacated and remanded on other grounds, 168 F. 2d 825 (CA1 1948).

tunity to respond in writing with supporting affidavits, and notice of any adverse decisions on or prior to the effective date of the termination, 5 CFR § 315.805.

The Congress in 1966 provided that all wrongfully discharged federal employees, including probationary employees are entitled to backpay, 5 U. S. C. § 5596, and the Court concludes that that is the employee's exclusive remedy.

But where an agency has terminated employment and the employee appeals to the Civil Service Commission, the Commission has no power to issue a stay of the agency's action. This is, therefore, not a case where the employee has gone to the courts for relief which the Commission could have granted but refused to do so. Nor is respondent challenging the Civil Service law; nor is she asking for a ruling on the merits of her claim; nor did the District Court, whose judgment was affirmed by the Court of Appeals, act in derogation of the administrative process. Rather, it protected that process by staying the discharge until the Commission had ruled on the appeal.

The power to issue a stay is inherent in judicial power and as indicated by the Court rests on the exercise of an informed discretion on a showing of irreparable injury to the applicant or to the public interest, *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 14. That doctrine is not limited, as the Department of Justice suggests, to issuance of stays by a court only after an appeal has been taken. We held in *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 603–604, that the All Writs Act, 28 U. S. C. § 1651, which empowers federal courts to " 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,' " extends to "potential jurisdiction of the appellate court where an

appeal is not then pending but may be later perfected." The District Court has at least a limited review of the Commission, *Norton* v. *Macy*, 135 U. S. App. D. C. 214, 217, 417 F. 2d 1161, 1164; *Dozier* v. *United States*, 473 F. 2d 866. Hence the All Writs Act justified its power to grant a stay.

We have, therefore, a case where a stay supplements and does not curtail administrative power, the Commission having no authority to grant that relief. The District Court power preserves the status quo, does not pass on the merits of the controversy, and limits its stay to the date when the merits of the discharge are adjudicated by the Commission. I agree with the Court that that order was appealable.

A point is made that respondent has not shown irreparable injury. That misstates the issue. The District Court issued a stay pending a hearing on whether a temporary injunction should issue. The hearing, if held, would encompass two issues: (1) whether the grounds for respondent's discharge antedated her present employment (see 149 U. S. App. D. C. 256, 269, 462 F. 2d 871, 884) and were not restricted to her record as a probationary employee;[1] and (2) whether she would suffer irreparable injury. As stated by the Court of Appeals, respondent "may show . . . irreparable damage, if the hearing before Judge Gasch is allowed to proceed to a decision." *Id.*, at 269, 462 F. 2d, at 884. The stay was issued by the District Court only because the federal

[1] Where, as here, conduct prior to appointment as a probationary employee as well as conduct during the period of employment is alleged to be the basis of the discharge, the requirements of procedural due process are obvious. We said in *Wieman* v. *Updegraff*, 344 U. S. 183, 192, "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." And see *Schwartz* v. *Covington*, 341 F. 2d 537, 538.

agency involved refused to produce as a witness the officer who had decided to discharge respondent. Both the District Court and the Court of Appeals were alert to the necessity to show irreparable injury before an injunction issues.

On that issue there is more than meets the eye.

Employability is the greatest asset most people have. Once there is a discharge from a prestigious federal agency, dismissal may be a badge that bars the employee from other federal employment. The shadow of that discharge is cast over the area where private employment may be available. And the harm is not eliminated by the possibility of reinstatement, for in many cases the ultimate absolution never catches up with the stigma of the accusation. Thus the court in *Schwartz* v. *Covington*, 341 F. 2d 537, 538, issued a stay upon a finding of irreparable injury where a serviceman was to be discharged for alleged homosexual activity: "[A]ppellee has shown that he will suffer irreparable damage if the stay is not granted. Irrespective of the government's recent assurance that the appellee would be reinstated if he prevails upon review of his discharge, the injury and the stigma attached to an undesirable discharge are clear." Unlike a layoff or discharge due to fortuitous circumstances such as the so-called energy crisis, a discharge on the basis of an employee's lifetime record or on the basis of captious or discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life. And we cannot denigrate the importance of one's social standing or the status of social stigma as legally recognized harm. In *Ah Kow* v. *Nuan*, 5 Sawy. 552, the Circuit Court, speaking through Mr. Justice Field, held that a Chinese prisoner could recover damages from the sheriff who cut off his queue, the injury causing great mental anguish, disgrace

in the eyes of friends and relatives, and ostracism from association with members of his own race.

There is no frontier where the employee may go to get a new start. We live today in a society that is closely monitored. All of our important acts, our setbacks, the accusations made against us go into data banks, instantly retrieved by the computer.[2] An arrest goes into the data bank even though it turns out to be unconstitutional or based on mistaken identity. There is no federal procedure for erasing arrests. While they arise in 50 States as well as in the federal area, only a few States have procedures for erasing them; and that entails a long and laborious procedure.[3] More-

[2] With dossiers being compiled by commercial credit bureaus, state and local law enforcement agencies, the CIA, the FBI, the IRS, the Armed Services, and the Census Bureau, we live in an Orwellian age in which the computer has become "the heart of a surveillance system that will turn society into a transparent world." Miller, Computers, Data Banks and Individual Privacy: An Overview, 4 Col. Human Rights L. Rev. 1, 2 (1972). Although the subject of congressional concern, the problem is one which has thus far avoided legislative correction. See Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). See also A. Miller, The Assault on Privacy (1971).

[3] Illinois provides that photographs, fingerprints, etc., be returned to unconvicted arrestees upon acquittal or release and further provides that the arrestee may petition a local court to have the record expunged by the arresting authorities. There is, however, no method for retrieving records which have been distributed to other law enforcement authorities or to private individuals. Ill. Ann. Stat., c. 38, § 206–5 (1973). Connecticut has a statute with similar shortcomings. Conn. Gen. Stat. Ann. § 54–90 (Supp. 1971); see Satter & Kalom, False Arrest: Compensation and Deterrence, 43 Conn. B. J. 598, 612–613. New York's former Penal Law provided that all fingerprints, photographs, etc., of those acquitted of criminal charges had to be returned to the individual *if* no other criminal proceedings were pending against the individual and he had no prior convictions. N. Y. Penal Law § 516 (1909).

over, this generation grew up in the age where millions of people were screened for "loyalty" and "security"; and many were discharged from the federal service; many resigned rather than face the ordeal of the "witch hunt" that was laid upon us. Discharge from the federal service or resignation under fire became telltale signs of undesirability. Therefore, the case of irreparable injury for an unexplained discharge from federal employment may be plain enough on a hearing.

The District Court and the Court of Appeals were well within the limits of the law in granting a stay so that the issue of irreparable injury might be determined. It hardly comports with any standard for the expenditure of judicial energies to spend our time trying to find error in the exercise of the lower court's discretion to protect federal employees by giving them at least a chance to prove irreparable injury.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In my view no appealable order has been entered in this case, and both the Court of Appeals and this Court accordingly lack jurisdiction.

The orders issued by the District Court are both temporary restraining orders. The first, issued on May 28 and captioned "Temporary Restraining Order," enjoined Mrs. Murray's dismissal until the determination of her application for an injunction. The second, issued on June 4 and also captioned "Temporary Restraining Order," provides "that the Temporary Restraining Order issued by this Court at twelve o'clock p. m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders." At no time did the District Court indicate it was issuing anything but a temporary restraining order. During the hearing on the application for a preliminary injunction, after the court indicated

it wanted to hear from Mr. Sanders in person, the Government informed the court that Mr. Sanders was then out of town on vacation. The court replied: "Let me know when he can be available." Counsel for the Government responded: "Very well." And the District Court then said: "The T. R. O. will be continued until he shows up. . . . Tell the agency I will continue the temporary restraining order until the witness appears." Tr. 10.

It is well settled that the grant or denial of a temporary restraining order is not appealable, except in extraordinary circumstances, not present here, where the denial of the temporary restraining order actually decides the merits of the case or is equivalent to a dismissal of the suit. See generally 11 C. Wright & A. Miller, Federal Practice & Procedure § 2962, pp. 616–617 (1973), and cases there cited.

The Court holds, however, that since the temporary restraining order was extended by the District Court beyond the time limitation imposed by Fed. Rule Civ. Proc. 65 (b), it became an appealable preliminary injunction. I cannot agree. Fed. Rule Civ. Proc. 52 (a) expressly provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." This Rule applies to preliminary injunctions, and as no findings of fact and conclusions of law have yet been filed in this case, no valid preliminary injunction was ever issued. See *National Mediation Board* v. *Air Line Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963); *Sims* v. *Greene*, 160 F. 2d 512 (CA3 1947).

Nor would it make sense for this Court to review the District Court's order in this case as the grant of a preliminary injunction. Where the District Court has not entered findings of fact and conclusions of law under

Rule 52 (a), meaningful review is well-nigh impossible. "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52 (a) of the Rules of Civil Procedure." *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940).

It is suggested that if an indefinitely extended temporary restraining order remained unappealable, the District Court would have virtually unlimited authority over the parties in an injunctive action. At the outset, this cannot justify this Court's reaching the merits of Mrs. Murray's claim for a preliminary injunction. Even if the order entered by the District Court is appealable, it should be appealable only for the purposes of holding it invalid for failure to comply with Rule 52 (a). This was the precise course taken by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board*, *supra*, on which the majority relies. See also *Sims* v. *Greene*, *supra*.

In addition, the Government had other courses it could have taken in this case. In view of the District Court's error in granting a restraining order of unlimited duration without complying with the requirements for a preliminary injunction, the Government could have moved the District Court to dissolve its order indefinitely continuing the temporary restraining order. Rule 65 (b) expressly provides for such a motion.[1] Had the Government followed this course, the District Court could have

[1] "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." Fed. Rule Civ. Proc. 65 (b).

corrected its error and gone on to resolve the issues presented by the application for a preliminary injunction. The end result would have been the grant or denial of a preliminary injunction, with findings of fact and conclusions of law, which we could meaningfully review.

Here, instead, we find the Supreme Court determining that although the District Court had jurisdiction to grant injunctive relief, the equities of Mrs. Murray's case did not support a preliminary injunction, when neither the District Court nor the Court of Appeals has yet confronted the latter issue.[2] I do not believe this makes for sound law.

Since the majority persists in considering the merits of Mrs. Murray's claim for injunctive relief, some additional comment is in order. I agree with the majority's conclusion that Congress did not divest federal courts of their long-exercised authority to issue temporary injunctive relief pending the exhaustion of both administrative and judicial review of an employee's claim of wrongful dismissal. I cannot accept, however, the way in which the majority opinion then proceeds to take away with the left hand what it has just given with the right, by precluding injunctive relief in all but so-called "extraordinary cases," whatever they may be.

At the outset, I see no basis for applying any different standards for granting equitable relief in the context of a discharged probationary employee than the long-recognized principles of equity applied in all other situations. See *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958). Indeed, it appears that the factors which the

[2] The Court of Appeals expressly stated that it was not evaluating Mrs. Murray's claim of irreparable injury because "any such finding . . . is for the trial judge, who has not yet (and may never) decide this point in favor of Mrs. Murray." 149 U. S. App. D. C. 256, 262 n. 21, 462 F. 2d 871, 877 n. 21 (1972).

majority would have courts weigh before granting injunctive relief are all encompassed within the traditional formulations. The adequacy of backpay as a remedy, for example, is relevant in determining whether the party seeking relief has shown that "without such relief, it will be irreparably injured." *Id.*, at 110, 259 F. 2d, at 925. Likewise, the possible disruptive effect which temporary injunctive relief might have on the office where respondent was employed or on the administrative review process itself relates to whether "the issuance of a stay [will] substantially harm other parties interested in the proceedings." *Ibid.*

However one articulates the standards for granting temporary injunctive relief, I take it to be well settled that a prerequisite for such relief is a demonstrated likelihood of irreparable injury for which there is no adequate legal remedy. But I cannot accept the majority's apparent holding, buried deep in a footnote, that because of the Back Pay Act, a temporary loss in income can never support a finding of irreparable injury, no matter how severely it may affect a particular individual. See *ante*, at 92 n. 68. Many employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide themselves with the essentials of life—*e. g.*, to buy food, meet mortgage or rent payments, or procure medical services. Cf. *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970). Government employees might have skills not readily marketable outside the Government, making it difficult for them to find temporary employment elsewhere to tide themselves over until the lawfulness of their dismissal is finally determined. In some instances, the likelihood of finding alternative employment may be further reduced by the presence on the employee's records of the very dismissal at issue. Moreover, few employers will be willing to hire and train a new employee knowing

he will return to his former Government position if his appeal is successful. Finally, the loss of income may be "temporary" in only the broadest sense of that word. Not infrequently, dismissed federal employees must wait several years before the wrongful nature of their dismissal is finally settled and their right to backpay established. See, *e. g.*, *Paroczay* v. *United States*, 177 Ct. Cl. 754, 369 F. 2d 720 (1966); *Paterson* v. *United States*, 162 Ct. Cl. 675, 319 F. 2d 882 (1963).

The availability of a backpay award several years after a dismissal is scant justice for a Government employee who may have long since been evicted from his home and found himself forced to resort to public assistance in order to support his family. And it is little solace to those who are so injured to be told that their plight is "normal" and "routine." Whether common or not, such consequences amount to irreparable injury which a court of equity has power to prevent.

Nor can I agree with the majority's analysis of Mrs. Murray's claim of damaged reputation. It is argued that Mrs. Murray can suffer no significant loss of reputation by procedural irregularities in effectuating her discharge because her claim is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge. *Ante*, at 91. In my view, this analysis not only reflects a total misunderstanding of the gist of Mrs. Murray's complaint, but also fails to comprehend the purposes behind the Civil Service Commission regulations at issue here.

The Commission provides a special pretermination procedure where a probationary employee is to be terminated "for conditions arising before appointment," not as an empty gesture, but rather because the employing agency might be mistaken about these preappointment conditions, and might decide not to dismiss the employee

if he is given an opportunity to present his side of the story. Mrs. Murray does not seek a hearing as an end in itself, but rather to correct what she believes is a mistaken impression the agency had about her conduct in her prior job, in the hope that with the record straight, the agency would not discharge her. She seeks to save her job and to avoid the blot on her employment record that a dismissal entails, and it is in this sense that she claims her dismissal would injure her reputation.

Whether the likelihood of irreparable injury to Mrs. Murray if she is not allowed to retain her job pending her administrative appeal, when balanced against the Government's interests in having her out of the office during this period, supports equitable relief in the present case is a question I would leave for the District Court. Because of Mr. Sanders' absence, the District Court cut short its hearing on the application for a preliminary injunction before either the Government or Mrs. Murray had an opportunity to present witnesses or other evidence. Mrs. Murray still has not had her day in court to present evidence supporting her allegation of irreparable injury, and what that evidence would be were she given that opportunity we can only speculate.